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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 555 su 509 for us brief

BRISTOL HACKBUSCH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

BRISTOL HACKBUSCH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petitioner, Bristol Hackbusch, being duly sworn and upon oath, respectfully petitions that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in this cause after rehearing on the 3rd day of December, 1947, affirming the judgment of the District Court of the United States for the Southern District of Indiana, entered on the 15th day of January, 1947.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, Judge Sparks dissenting, affirming said judgment filed on the 3rd day of November, 1947, is set out in the record (Tr. pp. 170-179) and the same is not yet reported.

I.

Summary and Short Statement of the Matter Involved.

This is a criminal action commenced by indictment against Bristol Hackbusch, Petitioner, in two (2) counts in the District Court of the United States for the Southern District of Indiana, Evansville Division. The Second Count of the indictment was quashed on motion of the Petitioner which leaves in the case Count One only (Tr. p. 22). This Count One of the indictment is based upon Title 18, Sec. 88, U. S. C. A., and charges the following:

> "On or about the first day of January, 1940, and continuously thereafter until the 27th day of May, 1946, at and in the Evansville Division of the Southern District of Indiana, as well as at and in other Divisions of said District and in other Judicial Districts of the United States, Bristol Hackbusch unlawfully, wilfully, knowingly, and feloniously conspired, confederated, and agreed with other persons to the Grand Jurors unknown and with Sterling J. Perry, an officer, director, agent, and employee of The National City Bank of Evansville, located at Evansville, Vanderburgh County, Indiana, a national bank, and a member bank, as defined by Sections 221-225 of Title 12 of the United States Code, and an insured bank as defined by Subsection (c) of Section 264 of Title 12 of the United States Code for the said Sterling J. Perry in his aforesaid capacity unlawfully, wilfully, knowingly, and feloniously to embezzle, abstract, and wilfully misapply moneys, funds and credits of said bank and moneys, funds and securities which had been entrusted to him, said Sterling J. Perry, in his aforesaid capacity as an agent, and employee of said bank, a Federal Reserve Agent, and make and cause to be made false entries in the books, reports, and statements of said bank, with intent on the part of said Bristol Hackbusch, said other unknown persons, and said Sterling

J. Perry to injure and defraud said bank and other companies, corporations and individuals to the Grand Jurors unknown, and with the further purpose on the part of said Bristol Hackbusch, said unknown persons, and said Sterling J. Perry to deceive the officers of said bank, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and all agents and examiners appointed to examine the affairs of said bank." (Tr. pp. 2-3.)

Count One of the indictment also contained allegations of thirty-seven (37) overt acts (Tr. 3-12). A motion to dismiss Count One of the indictment was by the Court overruled (Tr. 22). Petitioner entered his plea of not guilty (Tr. 17), and was tried by jury on Count One of said indictment before the Honorable Fred L. Wham, United States District Judge for the Eastern District of Illinois, who was by proper authority duly designated and assigned to try the case after the Honorable Robert C. Baltzell, Regular Judge of the United States District Court for the Southern District of Indiana had disqualified himself. The jury returned a verdict of guilty on said Count (Tr. 147-151), the Court rendered judgment thereon, passed sentence on the Petitioner from which an appeal to the Circuit Court of Appeals for the Seventh Circuit was prosecuted. At the conclusion of the evidence introduced by the Government, the Petitioner filed a motion for acquittal, which was overruled with exception to the Petitioner (Tr. 148-149). At the conclusion of all the evidence, the Petitioner filed a motion for acquittal, which was overruled with exception to the Petitioner (Tr. 150-151). Following the return of the verdict of the jury, Petitioner filed a motion for acquittal and new trial, which was by the Court overruled (Tr. 152-154). All motions were timely made and exceptions to the Court's ruling timely and properly taken.

The cause was submitted on appeal to the United States Circuit Court of Appeals for the Seventh Circuit at its October Term, 1946. Oral argument was held on September 30, 1947, before the Honorable William Sparks, Circuit Judge; Honorable Otto Kerner, Circuit Judge; Honorable Walter C. Lindley, District Judge (Tr. 170). That thereafter on the 3rd day of November, 1947, the written opinion of said United States Circuit Court of Appeals for the Seventh Circuit in said cause, Judge Sparks dissenting, was filed, showing that the same had been heard and determined before Sparks and Kerner, Circuit Judges, and Lindley, District Judge (Tr. 170-179). Thereafter on the 12th day of November, 1947, Petitioner filed his petition for rehearing. That the same is set out in the transcript, at pages 182-197. That thereafter on the 20th day of November, 1947, the United States of America filed its answer to the petition for rehearing. The same is set out in the transcript at pages 201-214. That thereafter on the 3rd day of December, 1947, the petition for rehearing of this cause was denied, Judge Sparks dissenting (Tr. 215). That upon the 29th day of December, 1947, by order of Fred M. Vinson, Chief Justice of the United States, the time for the filing of petition for certiorari in this cause was extended to and including February 1st, 1948 (Tr. 216).

The evidence disclosed the following:

Sterling J. Perry, aged fifty-four years, was born and reared in Evansville, Vanderburgh County, Indiana, and was employed by the National City Bank of Evansville from the time he graduated from high school in the year 1911 until May 27, 1946. During this time he rose from bank messenger (Tr. 25) through the different cages to cashier and in January, 1946 was elevated to Vice President of the National City Bank (Tr. 26 and 84). His salary as

cashier was $440 per month and as Vice President, $600 per month (Tr. 84). His additional income was approximately $200 per year. He had personal property of the value of $3,000 to $4,000, but owned no real estate (Tr. 85). Sterling J. Perry never told the Petitioner the extent of his wealth or resources.

In the early part of 1942 Mr. Perry became acquainted with the Petitioner, Bristol Hackbusch, who was in the drilling and general oil business (Tr. 86). They met when the Petitioner made a deposit and opened a checking account in the National City Bank on February 26, 1942. This account was entitled "Bristol Hackbusch, Trustee" (Tr. 87). At the time this account was opened the Petitioner signed what was designated by the Bank as a signature card. This card was retained by the Bank and is Government's Exhibit C (Tr. 49 and 87). This was the only signature card signed and lodged in the Bank by the Petitioner and the only account ever opened by Petitioner.

From time to time after September 15, 1943 Mr. Perry would advance and loan the Petitioner money to clear his checks when required. These favors were advanced by Mr. Perry because he felt sorry for the Petitioner as the result of his unsuccessful attempts to strike oil. It appears that the Petitioner at one time asked Mr. Perry if he would help him along with his oil business and Mr. Perry said that he would (Tr. 97). The first credits extended by Mr. Perry to Petitioner were from his own funds and the Petitioner was unaware that these funds came from any other source at any time. Mr. Perry honored Petitioner's checks when they were presented at the Bank for payment (Tr. 103). After Mr. Perry's personal funds were depleted, of which Mr. Perry never advised Petitioner, and of which Petitioner had no knowledge, he continued to loan Petitioner money by means of said credit, and Perry

individually made the arrangements whereby he could keep a record of these checks. Mr. Perry in order to take care of these checks, individually opened an account which he, Perry individually, termed the "S. Hackran Account", S. for Sterling, Hack for Hackbusch and ran for Randall. This account was opened without the consent or knowledge of the Petitioner on September 25, 1943 (Tr. 88). The S. Hackran account had previously been carried by Perry individually as the S. J. Perry, Special Account (Tr. 90, 91), and Petitioner had no knowledge of these or other fictitious accounts until after his indictment. In order to have sufficient funds in these accounts to meet the credits extended Petitioner, Perry deposited funds unlawfully secured from other accounts in the Bank and sold securities owned by customers of the Bank without their consent for the purpose of financing these accounts, the Petitioner having no knowldege or notice of any acts of Perry in said particulars (Tr. 89), and learned nothing of them until after his indictment. The S. Hackran Account was closed out on March 21, 1944 (Tr. 91) by Perry, of which Petitioner had no knowledge until after the indictment.

On January 22, 1944, Mr. Perry opened another account in the name of "B. Hackbusch" or "Bristol Hackbusch, Special", sometimes termed the "Red Special" by the employees of the Bank. This account was also opened without the consent or knowledge of the Petitioner, and was opened for the purpose of keeping a record of Mr. Perry's advancements of money to the Petitioner and separating these advancements from his advancements to Mr. Randall (Tr. 92). Petitioner had no knowledge of any kind or character of Mr. R[illegible]ll's relations or dealings with either Mr. Perry or the [illegible]al City Bank. This account was operated in the same [illegible]ner as the S. Hackran account, and was closed out on July 16, 1945 (Tr. 93). During the

period of time that these two fictitious accounts existed, the employees of the Bank were ordered by Mr. Perry to charge checks to these fictitious accounts when there were not sufficient funds in the Bristol Hackbusch, Trustees Account to cover the checks written by the Petitioner. The original account which was opened by the Petitioner as the Bristol Hackbusch, Trustee Account was in existence until August 20, 1946, when it was closed (Tr. 87). Mr. Perry at no time told the Petitioner that it was not his own money on which the Petitioner was drawing checks (Tr. 103).

Many records, checks and other papers were introduced into evidence and disclosed Perry's manipulations of various Bank accounts in order to keep funds in Perry's many fictitious accounts (Tr. 49-64). An audit of the Bank's bookkeeping made on or about May 27, 1946, disclosed a shortage of $142,765.37. The principal part of this shortage was in the Sundry Bond Account, and about $28,000 was in bonds which had been ordered and paid for by customers but for which the Federal Reserve Bank had not been paid. The following customers of the Bank purchased bonds for which the Federal Reserve Bank had not been paid: Miss Ellen Joyce Squier, $3,000, and Mrs. Charlotte Johnson, $25,000. The following bonds were in the Sundry Bond Account: William Schear, $30,598.17, $21,215.09 and $53,022.11, and Fred Fuehring, $11,000. After deducting the $1,070 which was found in Mr. Perry's desk at the Bank, the total deficit was $142,765.37 (Tr. 48, 49). Petitioner had no knowledge of any of the foregoing transactions.

Mr. Sterling J. Perry surrendered himself to the United States District Attorney at Indianapolis, Indiana, on May 27, 1946. At that time he confessed that he had embezzled $143,278.58 from the National City Bank of Evansville

(Tr. 31) and on the same day Mr. Charles B. Enlow, President of the National City Bank, received a phone call from Indianapolis to the effect that Mr. Perry had left a note in his desk addressed to Mr. Enlow which would disclose the whole story (Tr. 28). In this note Mr. Perry confessed his unlawful acts and placed the responsibility on himself alone. Mr. Enlow found the note in Mr. Perry's desk enclosed in an envelope which contained the $1,070.00 in cash (Tr. 49). This note was introduced in evidence as Government's Exhibit B-11 (Tr. 30), and it is here set out in full, as follows:

"F. J. Fuehring.....(11,000.—
W. Schear.....(21,215.09
W. Schear.....(53,022.11
A. Brentano.....(30,598.17
Mrs. Theo Nuhring (Actual Bonds Held in
Chi. By Thom. McKinnon Co.).....(10,513.21
126,348.58

Fed. Res. Debt
Mrs. E. M. Johnson, Jr.....(25,000.—
Miss E. J. Squier.....(3,000.—
Cash in Env..... 1,070 154,348.58
Actual bonds..... 10,000 11,070.—

11,070 143,278.58

(On Reverse Side)

None of the money involved was used for my family in any way.

None of the persons named on reverse have knowledge of, or any interest in any transaction entered * * * Their names were used without their consent. No person employed in this Bank had any part in this matter either directly or indirectly. I alone am responsible.

Sterling J. Perry."

During the years 1943, 1944, 1945 and 1946 and for many years prior thereto, the National City Bank of Evansville was a national bank insured in the Federal Deposit Insurance Corporation (Tr. 26 and 27), and was a Federal Reserve Agent representing the Treasury Department of the United States (Tr. 60).

The evidence disclosed that many of the checks written by Petitioner bore the same bank cancellation date (Tr. 68), although many of these checks had been written over a period of months. Mr. Perry explained this by stating that he let them accumulate and when the Petitioner had enough balance in his legitimate account, and the only account of which the Petitioner had any knowledge, he would debit these checks to the legitimate account in a lump sum, designating the debit with the initials "L. C." on the account, meaning "listed checks" (Tr. 70). Some of these checks were run through one of the fictitious accounts and later debited in Petitioner's legitimate account, thereby showing a debit in both accounts. In this way, the money which Mr. Perry paid out through one of the fictitious accounts was recovered by Mr. Perry when Petitioner deposited funds in his Bristol Hackbusch, Trustee Account. All of the deposits made to the fictitious accounts were made by Mr. Perry without the knowledge or the consent of the Petitioner, and all the deposits made to the Bristol Hackbusch, Trustee Account were made by the Petitioner (Tr. 89 to 94).

Mr. Sterling J. Perry enjoyed an exceptional reputation for integrity among the customers of the Bank (Tr. 72), and the record discloses that Mr. Schear on November 15, 1945, gave him a check for $100,000 for bonds and before receiving the bonds left on a trip and did not receive the bonds until June 15, 1946 (Tr. 32). Mr. Fred Fuehring place an order for $36,000 worth of bonds on April 18, 1946,

to be paid for by Mr. Perry by debiting the receipts from the sale of some stock owned by Mr. Fuehring. Mr. Fuehring did not receive the bonds until the third or fourth day of May, 1946 (Tr. 39, 40). Mrs. Charlotte Johnson gave Mr. Perry the authority to debit her account for $25,000 worth of bonds of May 17, 1946. However, she did not receive delivery of said bonds until June 2 or 3, 1946 (Tr. 41). Ellen Joyce Squier purchased from Mr. Perry $3,000 worth of bonds with cash on May 20, 1946, and did not receive delivery of same until May 27, 1946 (Tr. 43). Mr. Perry also enjoyed an exceptional reputation for integrity among bank officials and employees and the community at large. When Mr. Perry entered the Bank as a messenger in 1911, Mr. Charles B. Enlow was cashier, and Mr. Perry worked under Mr. Enlow from 1911 to May 27, 1946, during which time Mr. Enlow became President of the Bank. During all of this period of time, Mr. Enlow had complete confidence and faith in Mr. Perry's honesty and integrity, and Mr. Perry had that reputation in the community where he worked and lived, and with the patrons and customers of the National City Bank (Tr. 30).

Mr. Perry's estimate of the amount of money that was advanced to Petitioner or for his benefit was between forty and fifty thousand dollars (Tr. 96). However, Mr. Edward B. Knartzer, Special Agent and Analyst for the Federal Bureau of Investigation, who made the analysis on all the accounts involved herein and located in the National City Bank, stated that the Petitioner had received $27,582.91 of money belonging to the National City Bank, and had all the checks been debited to the Bristol Hackbusch, Trustee Account, this account would have been overdrawn in that amount (Tr. 120, 121). The evidence is silent on any effort on the part of the Government to ascertain what became of the money which represented the difference be-

tween $27,582.91 and the $143,278.58, the amount of Perry's admitted defalcation.

Mr. Perry, in his statement of the amount that the Petitioner received was considering all the money that he advanced to the Petitioner, without deducting from such amount the moneys repaid by the Petitioner through deposits to the Petitioner's legitimate account (Tr. 121).

Mr. Charles B. Enlow, President of the National City Bank, identified letters and copies of letters which were found in Mr. Perry's files and in the Bank's files concerning Petitioner. These letters were marked Government's Exhibit B-1 to B-10, inclusive, and were read to the jury by the United States District Attorney (Tr. 79). Some of these Exhibits were letters written by the Petitioner to the National City Bank and some were copies of letters written by Mr. Perry as an officer of the National City Bank in answer to credit inquiries directed to said Bank by various hotels and corporations regarding the Petitioner.

During the period of time that Petitioner was borrowing money from Mr. Perry, he was the owner and operator of valuable oil producing leases and property. That the value of these properties was $65,000.00 (Gov. Exh. O-5) and Petitioner was able to finance the drilling of many oil wells (Gov. Exh. B-10). Most of these wells which Petitioner drilled were dry holes and nonproductive (Tr. 97).

The Petitioner gave the National City Bank as reference for credit ratings on different occasions but did not give Sterling J. Perry as reference for such ratings (Tr. 83). The Petitioner went to the National City Bank on business on an average of about once a week. While at the Bank he usually stopped to talk to Mr. Perry at his desk, which was located at the front of the Bank behind a railing with the other executives of the Bank. This was the custom of most people who came into the Bank

because Mr. Perry had an exceptionally wide acquaintance (Tr. 72).

Checks that were stipulated and introduced into evidence as Government's Exhibit 1 were checks, the originals of which were lost by a Special Agent of the Federal Bureau of Investigation who was entrusted with the custody of all the Petitioner's books, records, bank accounts, cancelled checks and files (Tr. 122). These checks were written by the Petitioner for various purposes, including lease expenses, traveling expenses, income tax, supplies, living expenses, tools for leases, drilling expenses, labor for operating leases, lease supplies, insurance, lease repairs and automobile expenses, all in connection with his occupation of drilling for oil and producing oil. When these checks were presented to the National City Bank for payment, they were all paid and charged into Perry's fictitious accounts by his orders. The Petitioner Hackbusch never had a fictitious account in the National City Bank (Tr. 89).

Mr. Perry never at any time during all of these transactions informed Bristol Hackbusch, the Petitioner, that he was loaning money to anyone else or that he was unlawfully taking money from the National City Bank. Mr. Perry kept the whole affair as it affected the misapplication of National City Bank funds completely to himself because of his pride and the confidence people had in him (Tr. 105). He at no time agreed to enter into a conspiracy with the Petitioner to take money from the National City Bank, and he remained firm in the narration of his misconduct in his position with the National City Bank and stated that this narrative covering all his manipulations was true throughout (Tr. 106). Mr. Perry did not reveal to any of the officers of the Bank any of his embezzlement, misapplication of funds and false entries until his confession was made to the United States District Attorney

on May 27, 1946, and all of his acts were without the approval of the said officers and directors of the National City Bank of Evansville and without the knowledge or consent of this Petitioner (Tr. 107).

On cross-examination Sterling J. Perry testified as follows:

"Before going to Indianapolis on May 27 I had correctly listed on Government's Exhibit B-11 my shortages at the bank, and the statement contained on the reverse side was true. At the time I wrote this I was so overpowered by my own guilt that that was the only way I could write that statement, and I felt that I was making a true statement on that day.

Mr. Hackbusch had one account in the bank in his own name, and I established the other two accounts for him. To my knowledge, Bristol Hackbusch at no time prior to my going to Indianapolis on May 27 knew that I had established either of these two accounts. I did not tell him when the S. Hackran account or the Bristol Hackbusch Red Special account was set up, or anything about either of the accounts. Mr. Hackbusch came to me in the first instance in the bank, and from time to time I discussed his oil operations with him. I felt sorry for him, and began helping him out of my own funds, but as his operations grew, my funds were not sufficient to take care of the checks that he was writing and which I was paying, and finally it got completely beyond me. I did not tell Bristol Hackbusch at any time that those funds that he was drawing against were funds belonging to The National City Bank, nor did I tell him that I was manipulating one account or the other in the bank in order to take care of his checks. I never did tell him during the entire affair that I was short in my accounts at the bank. At the beginning of the whole thing I was just lending him money out of my own funds, and at one time he paid back $5,000 or better on accumulation of indebtedness. During that period of time and from then on until this got completely be-

yond me, Bristol Hackbusch had one succeeding piece of bad luck after another in his oil operations.

When I delivered these checks to Mr. Hackbusch at his office I did not take a copy of the bank record of the account to which the respective checks were charged. All I took was the checks themselves and the adding machine tape. I never did tell Mr. Hackbusch that I was taking money unlawfully from The National City Bank. I kept all that shortage of the whole affair completely to myself, mainly because of my pride. Bristol Hackbusch and I did not by word, sign, or otherwise agree to enter into a conspiracy to take money from The National City Bank.'' (Tr. pp. 102-106.)

The foregoing is quoted from Government's Brief in United States Circuit Court of Appeals at pages 35, 36.

Also, on recross examination Mr. Perry testified:

> ''Mr. Hackbusch did not receive any money from me except by virtue of checks. In my opinion any money that came to Bristol Hackbusch through The National City Bank came upon the presentation of a check by him some place.'' (Tr. 110.)

The foregoing is quoted from Government's Brief in United States Circuit Court of Appeals at page 38.

On June 14, 1946, Mr. Perry was indicted by a Federal Grand Jury and pleaded guilty to the indictment in the United States District Court, Southern District of Indiana, under criminal cause number 8575. Said indictment consisted of eleven counts and charged embezzlement, misapplication and false entries in the records of the National City Bank of Evansville (Tr. 101).

The Honorable Walter C. Lindley, United States District Judge for the Eastern District of Illinois, entered judgment imposing sentence upon said Sterling J. Perry upon his said plea of guilty, having been duly designated by proper authority and assigned to hear said cause. The Hon-

orable Robert C. Baltzell, regular judge of the United States District Court for the Southern District of Indiana having voluntarily disqualified himself. That the sentence imposed upon Perry upon his said plea of guilty, by the said Honorable Walter C. Lindley, as District Judge, was that said Sterling J. Perry be imprisoned for five (5) years upon count one of the indictment, five (5) years on count two thereof, and five (5) years on count three thereof. That each of said sentences should run consecutive and cumulative, and that sentence on counts four to eleven, inclusive, be withheld until the service of sentence on counts one, two and three, at which time said Perry be placed on probation for three years, all as set out in petitioner's Exhibit II which is attached hereto.

That said Honorable Walter C. Lindley, United States District Judge for the Eastern District of Illinois, is the same Judge Walter C. Lindley, who, together with the Honorable Otto Kerner and the Honorable William M. ~~Sparks~~ Sparks, Circuit Judges, heard and determined the appeal of the within cause of action in the United States Circuit Court of Appeals for the Seventh Circuit.

II.

Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction to Review the Judgment in Question.

The petitioner invokes jurisdiction in the United States Supreme Court under Section 240(a) of the Judicial Code as amended, Title 28, Sec. 347, U.S.C.A.

This petition is directed to the judicial discretion of the United States Supreme Court for the reason:

(a) That the United States Circuit Court of Appeals for the Seventh Circuit has decided an important question

of federal law in this cause which has not been but should be settled by the Supreme Court of the United States, and

(b) The United States Circuit Court of Appeals for the Seventh Circuit has decided a federal question in this cause in such a way as to be in conflict with the applicable decisions of the United States Supreme Court, and

(c) The United States Circuit Court of Appeals for the Seventh Circuit has so far departed in this cause from the usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision, and

(d) The United States Circuit Court of Appeals for the Seventh Circuit has so far sanctioned in this cause a departure from the accepted and usual course of judicial proceedings by the United States District Court for the Southern District of Indiana as to call for the exercise of the United States Supreme Court's power of supervision, and

(d) That in this cause the Hon. Walter C. Lindley improperly heard and determined this cause as a member of the United States Circuit Court of Appeals for the Seventh Circuit in contravention of the provisions of Sec. 120 of the Judicial Code, as amended, Title 28, Sec. 216, U.S. C.A., and

(f) The action of the United States Circuit Court of Appeals in affirming and sustaining the action of the United States District Court for the Southern District of Indiana in this cause constitutes a deprivation of petitioner's liberty without due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States of America.

That each of the foregoing questions is substantial within the meaning of the rules of the Supreme Court and the decided cases thereof, and requires the exercise of the sound judicial discretion of the United States Supreme

Court to supervise the action of the United States Circuit Court of Appeals for the Seventh Circuit by certiorari.

The Petition for Rehearing in this cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit upon the 3rd day of December, 1947 (Tr. p. 215) the opinion affirming the judgment of the United States District Court for the Southern District of Indiana having been entered upon the 3rd day of November, 1947. (Tr. p. 170.) Upon the 29th day of December, 1947, the Honorable Fred M. Vinson, Chief Justice of the United States, entered an order extending the time for the filing of the petition for certiorari in this cause to and including the 1st day of February, 1948.

III.

The Question Presented.

This petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit questions the correctness of its decision and judgment in this cause of action whereby the decision and judgment of the United States District Court for the Southern District of Indiana was affirmed.

(a) The petitioner herein takes the position that said decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous in that it sustains petitioner's conviction despite an entire absence of evidence to sustain the conviction and that, therefore, said United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law in this cause which should be settled by the Supreme Court of the United States. The conflict between the opinion herein and the following cases and supporting authorities should be settled by the Supreme Court of the United States. See *Gargotta*

v. *U. S.* (1935), 77 F. (2) 977, 981, 983, 984; ***Union Pacific Coal Co.*** v. *U. S.* (1909), 173 F. 740 (C.C.A. 8); *Linde* v. *U. S.* (1926), 13 F. (2) 59, 61 (C.C.A. 8); *Gerson* v. *U. S.* (1928), 25 F. (2) 49 (C.C.A. 8).

The holding of the United States Circuit Court of Appeals for the Seventh Circuit in this case is to the effect that an Appellate Court in examining the record on appeal must take the view of the evidence most favorable to the plaintiff and give to the plaintiff the benefit of all inferences which may reasonably be drawn from the evidence in such appeals. The question is not whether the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt but rather whether the verdict is supported by any substantial evidence, direct or circumstantial. Such holding is in direct conflict with the holding of the Ninth Circuit Court of Appeals in the case of *Karn* v. *U. S.* (1946), 158 F. (2) 568, which is to the effect that the evidence should be required to point so surely and unerringly to the guilt of the defendant as to exclude every reasonable hypothesis but that of guilt. The foregoing rule is fundamental in all jurisdictions.

(b) The petitioner herein takes the position that said decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous in that it sustains petitioner's conviction despite an entire absence of evidence to sustain the conviction, and that, therefore, the United States Circuit Court of Appeals for the Seventh Circuit has decided a federal question in this cause in such a way as to be in conflict with the applicable decisions of the United States Supreme Court: *Tot* v. *U. S.* (1943), 319 U. S. 463; 63 S. Ct. 1241; 87 L. Ed. 1519; *Kirby* v. *U. S.* (1899), 174 U. S. 47, 64; 43 L. Ed. 890, 897; 19 S. Ct. 574; *Coffin* v. *U. S.* (1895), 156 U. S. 432, 458; 49 L. Ed. 481, 493; 15 S. Ct. 394; see also *Bailey* v. *U. S.* (1946), 155 F. (2)

184; certiorari granted on Government's confession of error and reversed; ..... U. S. .....; 67 S. Ct. 64; 91 L. Ed. 30.

(c) In this cause there is no evidence to sustain the conviction, and the action of the United States Circuit Court of Appeals for the Seventh Circuit in affirming the action of the District Court so far departs from the usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision. The United States Circuit Court of Appeals in this cause has erroneously applied the doctrine of circumstantial evidence as laid down universally by the federal courts and state courts, and the cause, therefore, presents serious questions in the administration of criminal justice and the constitutional question of the deprivation of petitioner's liberty without due process of law by reason of the affirmance of a judgment wholly unsupported by any evidence. The exceptional circumstances of this case require that this court should decide every question in the case on the merits.

(d) The United States Circuit Court of Appeals for the Seventh Circuit in failing to reverse the action of the United States District Court for the Southern District of Indiana has sanctioned in this cause a departure from the accepted and usual course of judicial proceedings in the court below, as to call for the exercise of the United States Supreme Court's power of supervision. The timely motions of the petitioner made in the trial court for acquittal at the close of the Government's evidence and at the conclusion of the evidence and the petitioner's motion for acquittal made following the return of the verdict of the jury and petitioner's motion for new trial made at said time were each proper and should have been sustained, and the action of the United States Circuit Court of Appeals for the Seventh Circuit in failing to reverse this cause by reason of said total lack of evidence to sustain the trial court's rulings in each of the foregoing particulars re-

quires the United States Supreme Court to grant certiorari and reverse said action. The United States Circuit Court of Appeals in this cause has erroneously applied the doctrine of circumstantial evidence as laid down universally by the federal courts and state courts, and the cause, therefore, presents serious questions in the administration of criminal justice and the constitutional question of the deprivation of petitioner's liberty without due process of law by reason of the affirmance of a judgment wholly unsupported by any evidence. The exceptional circumstances of this case require that this court should decide every question in the case on the merits.

In the course of the trial of this cause in the United States District Court, after the jury had been deliberating upon its verdict, they were called back into court at their request for further instructions, at which time the court, the Hon. Fred L. Wham, the United States District Court Judge for the Eastern District of Illinois, who sat in the trial of this cause in the United States District Court, stated to the jury as follows:

> "Now, I want you to go back to the jury room, and go through the evidence again, and if necessary a second time—go through it and keep working.
>
> I sometimes work for days, trying to reach a solution of a case. I don't quit working. The jury must work, and you just can't guess a case off. You have got to work at it, review and review, try to get together. That is the purpose and duty of the jury and if the juries will not get together, the courts are stale-mated they can't make any progress." (Tr. p. 140.)

This statement of the court after the jury appeared hopelessly deadlocked was prejudicial, erroneous and coercive and constituted such a departure from the accepted and usual course of judicial proceedings by the United States District Court, which has been sanctioned by the United

States Circuit Court of Appeals for the Seventh Circuit by their affirmance of the action of the trial court, as to call for the exercise of the United States Supreme Court's power of supervision by granting certiorari.

(e) That in this cause the Hon. Walter C. Lindley improperly heard and determined this cause as a member of the United States Circuit Court of Appeals for the Seventh Circuit in contravention of the provisions of Section 120 of the Judicial Code as amended, Title 28, Sec. 216, U.S.C.A. The said Hon. Walter C. Lindley had previously been properly authorized and duly designated and assigned to try the case of United States *vs.* Sterling J. Perry in the United States District Court for Southern Indiana, the same being cause 8575 on the docket of said court, wherein the Hon. Robert C. Baltzell, Judge of the United States District Court for Southern District of Indiana had voluntarily disqualified himself for the trial of said cause against the said Sterling J. Perry, and the said Hon. Walter C. Lindley did, as Judge in the United States District Court for the Southern District of Indiana, accept the plea of guilty of said Sterling J. Perry in said cause, wherein he was charged with embezzlement, misapplication of funds and false entries in the records of the National City Bank of Evansville (Tr. p. 101), and the said Hon. Walter C. Lindley did impose sentence upon said Sterling J. Perry in said cause and entered judgment that said Sterling J. Perry be imprisoned for five (5) years upon count one of the indictment, five (5) years on count two thereof, and five (5) years on count three thereof. That each of said sentences should run consecutive and cumulative, and that sentence on counts four to eleven, inclusive, be withheld until the service of sentence on counts one, two and three, at which time said Perry be placed on probation for three years. The petitioner here-

in was charged in this cause in the District Court with the offense of conspiring with the said Sterling J. Perry to do the very acts to which the said Sterling J. Perry entered his plea of guilty and, therefore, the said Hon. Walter C. Lindley had served as the trial judge in said cause of action against said Sterling J. Perry, which action presented the same set of facts and the same related questions as were presented upon appeal of the within cause of action wherein said Hon. Walter C. Lindley served as a member of the United States Circuit Court of Appeals for the Seventh Circuit, which said court heard and determined petitioner's said appeal to that court. That the petitioner attaches to the within verified petition for writ of certiorari copies of the indictment against Sterling J. Perry in the United States District Court for the Southern District of Indiana, referred to above, and marked Exhibit I and the judgment of the United States District Court for the Southern District of Indiana in said cause, the Hon. Walter C. Lindley presiding, showing the plea of guilty of said Sterling J. Perry, the sentence imposed upon said Perry upon said plea, and the judgment of said court in said cause, and makes same a part hereof and same is marked Exhibit II. That to the first or original copy of the within petition is attached the Certificate of Albert C. Sogemeier, Clerk of the United States District Court for the Southern District of Indiana, certifying the authenticity of said exhibits.

By reason of the disqualification of the said Hon. Walter C. Lindley and the impropriety of his serving in this cause in the United States Circuit Court of Appeals, by said statutory provisions, the United States Supreme Court should grant certiorari herein and review this entire proceeding.

(f) The Fifth Amendment to the Constitution of the United States guarantees to petitioner that he will not be

deprived of his liberty without due process of law. The petitioner's conviction in the United States District Court in this cause wherein there was no competent evidence introduced which would sustain the verdict of the jury convicting him does not meet the foregoing constitutional requirements. The United States Supreme Court has universally held that a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. In this case there is an entire absence of evidence to sustain the conviction, or any element of conspiracy of the petitioner with Sterling J. Perry. On the contrary, all the evidence points unerringly to the innocence of the petitioner.

IV.

The Reasons Relied Upon for the Allowance of the Writ.

The writ of certiorari as herein prayed should be granted by reason that each of the questions presented above under (a) to (f) ~~each~~ presents a substantial question within the meaning of the rules of the Supreme Court of the United States and the decided cases thereof. That each of said questions presented presents a substantial challenge to the administration of criminal justice. The exceptional circumstances of this case require that this court should decide every question in the case on the merits. That the conviction of this petitioner is not supported by any competent evidence; is in violation of the applicable federal rules of conviction under or by circumstantial evidence; that the conviction herein affirmed by the United States Circuit Court of Appeals presents a situation in which the petitioner's liberty is being deprived without due process of law by reason of the total lack of evidence to support the verdict of the jury; that a situ-

ation is presented wherein a jury was erroneously and prejudicially instructed after it had retired to its jury room by coercive statements of the trial judge; and, further, a situation is now presented to the United States Supreme Court wherein the Hon. Walter C. Lindley improperly served as a member of the United States Circuit Court of Appeals on the hearing of petitioner's appeal to that court. The foregoing reasons demand that certiorari be granted herein to permit the United States Supreme Court under its power of supervision to review this cause.

WHEREFORE, the petitioner herein prays that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this honorable court.

Respectfully submitted,

BRISTOL HACKBUSCH.

STATE OF INDIANA,
COUNTY OF VANDERBURGH. } SS.

Before me, Billie Ellis, a Notary Public in and for said county and state, personally appeared this day Bristol Hackbusch, the petitioner, who being duly sworn, says that he has read the foregoing petition and understands the matters and things therein set out and the allegations of fact therein contained are true, as he verily believes.

Witness my hand and Notarial Seal this 26th day of January, 1948.

BILLIE ELLIS,
Notary Public.

My commission expires December 3, 1950.

EDWIN C. HENNING,
304 Citizens National Bank Bldg.,
Evansville, Indiana,

JOSEPH B. MINOR,
304 Citizens National Bank Bldg.,
Evansville, Indiana,

THEODORE LOCKYEAR,
702 Court Building,
Evansville, Indiana,
Attorneys for Petitioner.

Dated at Evansville, Indiana,
January 26, 1948.

EXHIBIT I.

United States of America,
Southern District of Indiana, } ss:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

May Term, 1946.

United States of America
v.
Sterling J. Perry } No. 8575 Cr.

(Filed June 14, 1946. Albert C. Sogemeier, Clerk.)

The Grand Jurors of the United States, within and for the Southern District of Indiana, impaneled, sworn, and charged in said Court at the term and division aforesaid, to inquire for the United States for the Southern District of Indiana, upon their oaths charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on or about the 25th day of March, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured

in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 25th day of March, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the Board of Directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and said Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the board of directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred thousand dollars ($100,000.00) and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with the intent on the part of said defendant to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the grand jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, did then and there apply said one hundred thousand dollars ($100,000.00) received by him from the sale of securities entrusted to his care by William Shear, a customer of said bank, to take up

cash items in a like amount, which cash items had previously been accumulated and held by him in said bank, a more particular description of which cash items is to the grand jurors unknown.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 30th day of January, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 30th day of January, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds, and credits of said member bank,

did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, feloniously, and with the intent to injure and defraud said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle and appropriate to his own use from said member bank certain of the moneys, funds, and credits of said member bank of the value of one thousand two hundred forty-seven dollars and thirty-one cents ($1,247.31), a more particular description of which said moneys, funds, and credits is to the Grand Jurors unknown, which said moneys, funds, and credits had theretofore come into his possession and under his control by virtue of his aforesaid position with and in said member bank.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 30th day of January, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in

the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 30th day of January, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank for January 30, 1946, in that it was made to show by said entry, as so made and caused to be made, reflected a balance of forty-three thousand four hundred thirty dollars and nineteen cents ($43,430.19), whereas said balance in said remittance account in said bank statement for January 30, 1946, should have been the amount of forty-two thousand one hundred eighty-two dollars and eighty-eight cents ($42,182.88), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 20th day of September, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 20th day of September, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the juris-

diction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the board of directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of sixty-three thousand five hundred four dollars and sixty-two cents ($63,504.62) and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, did then and there misapply a check in the amount of sixty-three thousand dollars five hundred four dollars and sixty-two cents ($63,504.62) that date received to the credit of the account of H. R. Randall, special account, whereas said check should have been credited to the account of Hercules Body Company in and with said bank, as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT V.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 31st day of July, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant

to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 31st day of July, 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the board of directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred twenty thousand dollars ($120,000.00) and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, and in the

following manner and by the following means: said defendant, in his aforesaid capacity, did then and there misapply a certain one hundred twenty thousand dollar ($120,000.00) check of Southern Indiana Gas and Electric Company payable to the order of Commonwealth and Southern to be credited to the following accounts in the following amounts:

Hercules Body Company	$71,487.37
Bristol Hackbush, special account	$ 6,500.00
Bristol Hackbush, special account	$14,512.63
H. R. Randall, special account	$12,500.00
J. L. Taylor account	$ 6,500.00
J. L. Taylor account	$ 8,500.00

whereas said check should have been credited to the account of the Philadelphia National Bank of Philadelphia, Pennsylvania, all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

Sterling J. Perry, late of said district, at and in the Evansville Division thereof, was on the 9th day of August, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the de-

posits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 9th day of August, 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank for August 9, 1944, in that said entry, as so made and caused to be made reflected a balance of ninety-eight thousand two hundred seventy-one dollars and forty-nine cents ($98,271.49) in the remittance account, whereas in truth and in fact the balance in said remittance account for said August 9, 1944, should have been seven thousand seven hundred seventy-one dollars and forty-nine cents ($7,771.49), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

Sterling J. Perry, late of said district, at and in the Evansville Division thereof, was on the 29th day of August, 1944, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 29th day of August, 1944, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the juris-

diction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry on the general statement of said bank for August 29, 1944, in that said entry, as so made and caused to be made reflected a balance of one hundred twenty-one thousand two hundred eighteen dollars and nineteen cents ($121,-218.19) in the remittance account, whereas in truth and in fact the balance in said remittance account for said 29th day of August, 1944, should have been forty-six thousand two hundred eighteen dollars and nineteen cents ($46,218.19), all as the defendant then and there well knew at the time he made said false entry and caused the same to be made as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT VIII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 24th day of February, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Cor-

poration, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 24th day of February, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously and without authority from the board of directors of said member bank, misapply certain of the moneys, funds, and credits of said member bank in the amount of one hundred forty-three thousand one hundred twenty-nine dollars and fifty-two cents ($143,129.52) and of that value, a more particular description of said moneys, funds, and credits being to the Grand Jurors unknown, all with intent to convert said moneys, funds, and credits to his own use and to the use of other persons, companies, and corporations, the names and descriptions of all of which are to the Grand Jurors unknown, in the following manner and by the following means: said defendant, in his aforesaid capacity, caused the following accounts to be credited in the following amounts:

The Ingle Coal Company.....$50,000.00
The Hercules Body Company.....$63,900.00
H. R. Randall special account.....$29,229.52

whereas in truth and in fact said one hundred forty-three thousand one hundred twenty-nine dollars and fifty-two cents ($143,129.52) should have been credited to the account of Indiana National Bank of Indianapolis, at Indianapolis, Indiana, all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 27th day of February, 1945, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of February, 1945, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, without authority of the

board of directors of said member bank and with intent to injure and defraud said member bank, other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, and with further intent to deceive the officers of said member bank, the Comptroller of the Currency, and any and all agents and examiners appointed to examine the affairs of said member bank, and also the Federal Reserve Board and the Federal Deposit Insurance Corporation, did then and there within the jurisdiction of this Court unlawfully, knowingly, wilfully, and feloniously make and cause to be made a false entry in a book of said member bank then and there of and among the books regularly kept at, in, and by said member bank in the due course of business therein and known as the general ledger on a loose leaf sheet thereof reflecting the deposits and withdrawals of the account of The Hercules Body Company, of Evansville, Indiana, which entry purports to show and in effect does indicate and declare that the said The Hercules Body Company had a balance of only three hundred two thousand nine hundred ninety-six dollars and eighty-nine cents ($302,996.89) in said account at the close of business on February 27, 1945, whereas in truth and in fact the said The Hercules Body Company had a true balance in said account on said date of four hundred twenty-three thousand nine hundred ninety-six dollars and eighty-nine cents ($423,996.89), all as the defendant then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT X.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 27th day of May, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of May, 1946, the said Sterling J. Perry, while then and there acting in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds, and credits of said member bank, did then and there within the jurisdiction of this Court, unlawfully, knowingly, wilfully, feloniously, and with the intent to injure and defraud said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle and appropriate to his own use from said member bank certain of the moneys, funds, and cred-

its of said member bank of the value of one hundred forty-two thousand seven hundred sixty-five dollars and thirty-seven cents ($142,765.37), a more particular description of which said moneys, funds, and credits is to the Grand Jurors unknown, which said moneys, funds, and credits had theretofore come into his possession and under his control by virtue of his aforesaid position with and in said member bank.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT XI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

STERLING J. PERRY, late of said district, at and in the Evansville Division thereof, was on the 27th day of May, 1946, and for a long time prior thereto had been, an officer, to wit, vice-president, of The National City Bank of Evansville, a national bank theretofore organized and then existing and doing a banking business at Evansville, in Vanderburgh County, in the State of Indiana, under and pursuant to the laws of the United States, said bank being then and there a member bank of the Federal Reserve Bank of St. Louis, Missouri, Federal Reserve District No. 8, the deposits of which member bank were then and there insured in accordance with the provisions of law by, with, and in the Federal Deposit Insurance Corporation, a corporation theretofore organized and then existing and doing business under and pursuant to the laws of the United States of America, and in which said corporation the United States of America then and there owned a part of the capital stock; that on or about said 27th day of May, 1946, the said Sterling J. Perry, while then and there act-

ing in his aforesaid capacity as vice-president of said member bank, through the power, control, direction, and management which he had and possessed as such vice-president over the moneys, funds, and credits of said member bank, did then and there within the jurisdiction of this Court unlawfully, wilfully, knowingly, feloniously, and with the intent to injure and defraud said member bank and other companies, bodies politic, bodies corporate, and individual persons, the names of all of whom are to the Grand Jurors unknown, embezzle, abstract, and wilfully misapply certain moneys, funds, and securities in the amount and of the value of one hundred forty-two thousand seven hundred sixty-five dollars and thirty-seven cents ($142,765.37), which said moneys, funds, and securities had theretofore been entrusted to him, said defendant, in his aforesaid capacity as an agent and employee of The National City Bank of Evansville, a Federal Reserve agent, a more particular description of which said moneys, funds, and securities, is to the Grand Jurors unknown.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

12 U. S. C. A. 592.

(Signed) B. HOWARD CAUGHRAN,
United States Attorney.

EXHIBIT I.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF INDIANA } ss: Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of an indictment returned and filed June 14, 1946, in the cause of United States of America *vs.* Sterling J. Perry, No. 8575 Criminal now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis this 19th day of September, A. D. 1946.

ALBERT C. SOGEMEIER,
Clerk,

By DOROTHY G. PHIPPS,
Deputy Clerk.

(SEAL)

EXHIBIT II.

DISTRICT COURT OF THE UNITED STATES,

Southern District of Indiana,

Indianapolis Division.

United States of America
vs.
Sterling J. Perry.
} No. 8575 Criminal.

At Indianapolis in said District on the 19th day of June, 1946, before the Honorable Robert C. Baltzell, Judge.

Comes now B. Howard Caughran, Esq., Attorney for the United States, and comes also the defendant, Sterling J. Perry, in his own proper person, and it appearing to the Court that the defendant appears in court without counsel, said defendant now states in open court that he has had the assistance and advice of counsel and for the purpose of arraignment desires to waive the presence of his counsel, and that he thoroughly understands the charge against him.

The defendant now being arraigned upon the indictment herein, for plea thereunto, says that he is guilty as charged therein, and said defendant requests that judgment be rendered in the Indianapolis Division of this District.

It is ordered by the Court that this cause be continued for investigation by the Probation Officer of this Court.

DISTRICT COURT OF THE UNITED STATES,

Southern District of Indiana,

Indianapolis Division.

United States of America
vs.
Sterling J. Perry.
} No. 8575 Criminal.

At Indianapolis, in said District, on the 27th day of June, 1946, before the Honorable Walter C. Lindley, Judge.

Comes now B. Howard Caughran, Esq., Attorney for the United States, and comes also the defendant, Sterling J. Perry, in his own proper person and by his attorney, Edward E. Meyer, and this cause having been continued for investigation by the Probation Officer of this Court, and the Probation Officer having made his report to the Court, said Attorney for the United States now moves the Court for sentence and judgment upon the plea of guilty heretofore made and entered herein, the defendant having heretofore requested that disposition be made in the Indianapolis Division of this District.

The defendant having been asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It is therefore considered and adjudged by the Court that the defendant, Sterling J. Perry, is guilty of each of the offenses charged in the indictment.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense charged in Count I of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be desig-

nated by said Attorney General or his authorized representative.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense charged in Count II of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be designated by said Attorney General or his authorized representative, and that said imprisonment of Five (5) years be consecutive and cumulative with and begin at the termination of the sentence imposed on Count I of the indictment.

It is further considered and adjudged by the Court that said defendant, Sterling J. Perry, for the offense charged in Count III of the indictment be committed into the custody of the Attorney General of the United States or his authorized representative for imprisonment and confinement for a period of Five (5) years in an institution to be designated by said Attorney General or his authorized representative, and that said sentence shall be consecutive and cumulative with the sentence imposed herein on Counts I and II and begin at the termination of the sentence on Count II of the indictment.

It is further considered and adjudged by the Court that the said defendant, Sterling J. Perry, pay unto the United States of America a fine in the sum of Five Thousand Dollars ($5,000.00) as a part of the judgment on Counts I, II and III of the indictment, and that he be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further considered and adjudged by the Court that the imposition of sentence on each of the Counts IV, V, VI, VII, VIII, IX, X and XI inclusive of the indictment be, and the same is, hereby suspended, and upon the release

of the defendant from the service of the sentences hereinbefore imposed upon him, said defendant is to be and remain under the supervision of the Probation Officer of this Court under probation for a period of Three (3) years during the good behavior of said defendant unless the Court otherwise directs.

(Signed) WALTER C. LINDLEY,
Judge.

CERTIFIED COPY.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF INDIANA. } ss: Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of an Order made and entered June 19, 1946, Sentence and Judgment made and entered June 27, 1946, and of Prison Warrant issued June 27, 1946 with the Marshal's return endorsed thereon, in the cause of United States of America *vs.* Sterling J. Perry, No. 8575 Criminal now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis this 19th day of January, A. D. 1948.

ALBERT C. SOGEMEIER,
(SEAL) *Clerk.*

By DOROTHY G. PHIPPS,
Deputy Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

BRISTOL HACKBUSCH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

THE OPINION.

The petitioner herein by verified petition for writ of certiorari seeks a review of a judgment and opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which judgment and opinion was filed on the 3rd day of November, 1947, and which is set out in the Transcript herein, page 170 to page 180, inclusive, and upon which a petition for rehearing was denied upon the 3rd day of December, 1947 (Tr. 215). That the opinion of the United States Circuit Court of Appeals for the Seventh Circuit is not yet reported.

II.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED.

This statement is set out in the preceding petition under that part of same denominated II. BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION, page 15 to page 17 of same, which is hereby adopted and made a part of this brief by reference.

III.

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to a consideration of the questions presented is set out in the preceding petition under that part denominated I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED, page 2 to page 15 of same, which is hereby adopted and made a part of this brief by reference.

IV.

SPECIFICATION OF THE ERRORS INTENDED TO BE URGED.

This specification is set out in the preceding petition under that part denominated III. THE QUESTIONS PRESENTED, page 17 to page 23 of same, which is hereby adopted and made a part of this brief by reference.

V.

ARGUMENT.

Summary of the Argument.

A. The evidence does not sustain the conviction and the Circuit Court of Appeals has improperly applied the law of circumstantial evidence.

B. The trial judge's further instructions to the jury were erroneous, prejudicial and coercive.

C. Judge Walter C. Lindley was disqualified to serve as a member of the Circuit Court of Appeals to hear and determine the appeal of this cause to that court.

D. The action of the Circuit Court of Appeals in sustaining the District Court constitutes a deprivation of Petitioner's liberty without due process of law.

ARGUMENT.

A.

The Petitioner can only be deprived of his liberty upon substantial evidence to sustain a conviction. In this case there was a total absence of evidence of the petitioner's guilt, and not a syllable of evidence establishing any fact or circumstance, or anything from which an inference could be drawn inconsistent with the petitioner's innocence. The petitioner was convicted upon suspicion only, with not a single fact established to sustain the verdict of the jury or the judgment of the trial court. The United States Circuit Court of Appeals should have reversed the decision of the trial court, and should have sustained petitioner's motion for a rehearing. The petitioner should have been discharged upon his motions for a directed verdict of acquittal which motions were timely and properly made.

There were not many witnesses who testified in this case, but an avalanche of exhibits submerged an analysis of the evidence from the witnesses, and gave birth to a suspicion, and only a suspicion, and upon that suspicion alone the jury returned a verdict, and step by step, that verdict so returned has been upheld. The result has been that though there existed a total and complete failure of evidence, the tribunal wandered into the field of suspicion, returned a "verdict of guilty" of the petitioner, thus depriving him of his liberty in the very teeth of the "due process of law" guaranteed him by the Fifth Amendment to the Constitution.

The only evidence offered by the Government in the trial of this case was jurisdictional, and to prove that Sterling

J. Perry was guilty of embezzlement and mis-application of funds, and making false entries in the records of The National City Bank of Evansville. The record in this case can be read and reread until time is no more, and never from lips of any witness can be discovered any fact, any circumstance, any fair inference that petitioner conspired with Sterling J. Perry in any manner to defraud said National City Bank. Indeed all the evidence proves the contrary, and only upon suspicion could the verdict have been reached, and only by reason of that suspicion could the case have possibly reached the status where we are seeking entrance to this Court to the end that the United States Supreme Court can proclaim by its supervision of the acts and judgments of its inferior courts, that verdicts, judgments and appeals cannot rest on "no evidence" or "suspicion" is repugnant to the Constitution of the United States, repugnant to American justice, and repugnant to and in violation of the guarantee of due process of law.

It is true that petitioner became indebted to Sterling J. Perry by reason of the fact that said Perry agreed to take care of his "no fund checks", but such were to be taken care of by Sterling J. Perry from his personal resources and not from funds of The National City Bank. The truth is and the truth of it which is inescapable, Perry from his own funds began taking care of petitioner's "no fund checks" and to keep a record of those loans Perry himself without knowledge of, notice to, or consent of the petitioner, established an account with The National City Bank in the name of S. J. Perry, Special. (Tr. 90, 91.) Perry continued this account and without the knowledge of, notice to or consent of the petitioner, changed that account to the name of S. Hackran, "S" for Sterling, "Hack" for Hackbusch, and "ran" for Randall. Perry continued that account until he decided that he could better take care

of the indebtedness to him by separate accounts for petitioner and Randall, so he established the B. Hackbusch Red Special without the knowledge of, notice to or consent of the Petitioner. (Tr. 92.) Various employees of the Bank had knowledge of those accounts but the petitioner never. The fact is Sterling J. Perry was as anxious and cunning in concealing his criminal acts from petitioner as he was in concealing them from the officers of the Bank. He never presented petitioner with any Bank statement showing any account such as S. Hackran or B. Hackbusch Red Special. Had he done so it is fair to infer that such procedure would have stopped instantly upon discovery of it. All that Perry did was to furnish petitioner with an adding machine tape of the total of the "no fund checks" which would represent the amount of the debt of Petitioner to Perry.

The witnesses gave no evidence detrimental to petitioner. Charles B. Enlow testified, "While I do not know Bristol Hackbusch, I have seen him at different times in the bank, but really did not know who he was until I came into court this morning. I did not know that he had an account with the Bank." (Tr. 27.)

William Schear, James O. Lynch, George D. Smith, Fred J. Fuehring, Charlotte Johnson, Ellen Joyce Squier, Charles B. Froelich, and George M. Specht, all followed Mr. Enlow as Government witnesses, and not one of them gave any evidence involving petitioner, but their testimony was of transactions solely with Sterling J. Perry and was solely proof of Sterling J. Perry's defalcations, misapplications and false entries.

Robert E. Carter, the next Government witness, Auditor of National City Bank, gave no testimony except to repeat the matters as a whole testified to by the witnesses in the preceding paragraph, which facts were testified to by

the several witnesses of their individual transactions with Mr. Perry. The only testimony of Carter that related to petitioner was that he would see Hackbusch talking with Perry at Perry's desk in the Bank, sometimes after banking hours, but never heard anything they were discussing, and stated that most all of the customers of the Bank would stop and talk to Mr. Perry, as he had an exceptionally wide acquaintance, and enjoyed an exceptional reputation for integrity among the customers of the Bank. (Tr. p. 72.)

Edward V. Knartzer, Government witness and special agent of the Federal Bureau of Investigation, testified that he made a special analysis of the three accounts, viz.: Bristol Hackbusch Trustee, S. Hackran and B. Hackbusch Red Special, and at the close of all the accounts of the petitioner, the aggregate overdraft as shown by the records of the bank was $27,582.91. "The petitioner and his counsel have been cooperative with us in the investigation of this case." (Tr. pp. 110-120.)

Sterling J. Perry, the chief witness relied on by the Government, testified as set out in our Petition for Certiorari at pages 13-14 thereof and is now adopted as a part of this Argument.

It is especially significant that no witness testified to anything derogatory to petitioner's innocence, or any circumstance or fact that an inference could be drawn inconsistent with his innocence. It is furthermore significant that Mr. Perry testified emphatically that no one knew that he was embezzling or misapplying the bank's funds, or making false entries. It was a secret wholly and solely in his own keeping, never disclosed to anyone until his confession May 27, 1946, and never at any time disclosed it to the petitioner and petitioner and Perry did not by word, sign, or otherwise agree to enter into a conspiracy to take money from The National City Bank.

The Government, when it put Sterling J. Perry to the Court and Jury as a witness, clothed that witness with the robe of credibility and was bound by his testimony. Sterling J. Perry was not a hostile witness, and it was not and will not be either truth, honest or fair for the Government to say "that because of his reluctance to testify forcibly and frankly, somewhat hesitates, equivocates and even contradicts himself, is not bound by every word which proceeds out of the mouth of such witness, but his evidence is to be considered in judging its probative value." Sterling J. Perry did not hesitate or equivocate or contradict himself. Sterling J. Perry was not an adverse or hostile witness.

Where the burden is on the plaintiff to prove a fact and he introduces a witness to prove that fact and his testimony not only fails to prove the fact but disproves it, the plaintiff cannot successfully contend that the witness was hostile or contend that the fact may be inferred because of the witness' servitude.

Burdon v. *Wood* (C. C. A. 7) (1944) 142 F. (2d) 303, 305, 306.

Bowditch v. *Boston,* (1880) 101 U. S. 16, 22.

Manchester Bank v. *Harrington,* (1917) (Mo.) 199 S. W. 242, 249.

Russell v. *Scharfe* (1921) 76 Ind. App. 191, 130 N. E. 437, 439.

C. & O. Ry. Co. v. *Martin* (1931) 283 U. S. 209, 214; 51 S. Ct. 453; 75 L. Ed. 983.

Penn Oil Co. v. *Vacuum Oil Co.* (1931) 48 F. (2) 1008, 1011.

Roberts v. *Chicago,* (1914) 262 Ill. 228, 232; 104 N. E. 708.

Testimony of a party favorable to himself given as a witness must be taken as true unless it is impeached.

Coonrod v. *Kelly* (1902) 119 Fed. 841, 846.

Burdon v. *Wood* (1944) (C. C. A. 7) 142 F. (2) 303, 305, 306.

All the evidence in this case, oral or record, exhibits or otherwise, establishes no fact nor circumstance from which a sensible inference can be drawn, inconsistent with petitioner's innocence, nor consistent with petitioner's guilt. The evidence does establish the guilt of Sterling J. Perry of embezzlement, misapplication of funds and making false entries in the records of The National City Bank, and nothing more. He had already pleaded guilty to that charge, and the evidence offered did nothing but confuse the jury, and appears as a purposeful effort to create an atmosphere of suspicion.

The United States Circuit Court of Appeals for the Seventh Circuit in its opinion affirming the judgment of the trial court says:

> "So well is the law established that we need not cite any authorities that a reviewing court must not undertake to determine the weight of the evidence or the credibility of the witnesses. An appellate court, in examing the record, must take that view of the evidence most favorable to the plaintiff, and must give to the plaintiff the benefit of all inferences which reasonably may be drawn from the evidence. In such appeals the question presented is not whether the evidence is sufficient to prove defendant's guilt beyond a reasonable doubt, but rather, whether the verdict is supported by any substantial evidence, direct or circumstantial. Having these principles in mind, we proceed to relate the more important facts established by the verdicts of the juries and the law applicable thereto."

Such statement of the law is in direct conflict with the holding of the Ninth United States Circuit Court of Appeals in the case of *Karn* v. *U. S.*, 158 Fed. (2d) 568 (1946), to the effect: "The evidence should be required to point so surely and unerringly to the guilt of the defendant as to exclude any reasonable hypothesis but that of guilt." That rule is universal in the courts and is fundamentally the law.

In the case of *Gargotta* v. *U. S.* (1935), 77 Fed. (2d) 977, 981, 983, 984:

> "The defendant is presumed to be innocent, and this presumption is a real presumption in his favor which abides with him at every stage of the trial. The burden of proof was on the government to prove his guilt beyond a reasonable doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties. * * *
>
> "This court has frequently announced and committed itself to the rule: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial jduge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error.' * * *"

This argument could be extended to great length by quoting from innumerable federal and state authorities, but as stated in the preceding opinion in the Gargotta case, "no principles of criminal law are more fixed that these. They have been proclaimed by every court of record throughout the land." Petitioner states to this Court with confidence that the basis of analysis of the United States Circuit Court of Appeals Seventh Circuit resulting in an affirmance of the trial court's judgment, was a departure from and in conflict with every federal decision on the subject.

Petitioner was convicted upon no evidence, and such conviction is in violation of the Constitution of the United States and every principle of justice.

Conspiring imports a corrupt agreement between not less than two people with guilty knowledge on the part of each.

Linde v. *U. S.* (1926) 13 Fed. (2d) 59, 61.
Morrison v. *California* (1934) 291 U. S. 82, 92; 54 S. Ct. 281; 78 L. Ed. 664.
Pettibone v. *U. S.* (1893) 148 U. S. 197; 13 S. Ct. 542; 37 L. Ed. 419.
Davidson v. *U. S.* (1932) 61 Fed. (2d) 250, 253.

The law questions involved in the prosecution of petitioner and the granting of a writ of certiorari for a rightful and righteous solution and determination of the innocence or guilt of petitioner are simple, fundamental and so far as we have been able to discover, are applied in every jurisdiction of the nation, federal and state. Likewise, the evidence physically abundant, yet when shorn of countless exhibits about which there has been no dispute, and as the record discloses, petitioner at all times was ready and willing to stipulate, it boils down to the evidence of Sterling J. Perry who was the government's witness, and whose testimony every step of the way, convincingly proves that Bristol Hackbusch was never allied in any manner with Sterling J. Perry in any kind of undertaking, understanding or conspiracy directly, indirectly, inferentially or otherwise with any intent or purpose for Sterling J. Perry to embezzle or misapply moneys or credits of the National City Bank of Evansville or to make or cause Sterling J. Perry to make false entries in records, books or statements of said bank, or to injure or defraud said Bank or any one, or to deceive the officers of said Bank, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or any of its agents and examiners.

Sterling J. Perry testified as follows: "I never did tell Mr. Hackbusch that I was taking money unlawfully from The National City Bank. I kept all that shortage and the whole affair completely to myself, mainly because of my pride. Bristol Hackbusch and I did not by word, sign, or otherwise agree to enter into a conspiracy to take money from The National City Bank." If Perry was taking money and funds from the Bank in any manner, or by any method, no one on earth knew it but Perry himself. Petitioner had no knowledge of it, and could not have any knowledge of it except through Perry and that he never had. This is the Government's own witness, uncontradicted and unimpeached.

There are no premises that warranted the submission of it to the jury or justify a verdict of guilty, or a judgment on such a verdict, and all the established facts were against the Government, so no "established facts and inescapable inferences" existed inconsistent with the accused's innocence. The counsel for the Government casts aside the solid established facts that determine the innocence or guilt of the accused, and makes an argument on scraps, patches, shreds and ravellings which weave a web of suspicion only. There is not a scintilla of evidence that presents or establishes a fact or premise for an inference of any kind or character against petitioner's innocence. Suspicion only, and when a decision rests on suspicion, reason fails and justice dies.

One charged with crime must be proven guilty by substantial evidence. The United States Circuit Court of Appeals for the Seventh Circuit in affirming the judgment of the trial court, departed diametrically from the principles of law stated in the case of *Karn* v. *U. S.* (1946) 158 F. (2) 568 (C. C. A. 9) and *McLaughlin* v. *U. S.* 26 F. (2) 1 (C. C. A. 3), and based its opinion on the case of *Ray* v. *U. S.* (1940) 114 Fed. (2d) 508 wherein the facts are wholly

dissimilar, and the only similarity was that both were conspiracy charges.

It appears to us that the most applicable observation that we can make is this: In the case of *Bailey* v. *U. S.* (1946) Judge J. Earl Major, in his dissenting opinion, 155 Fed. (2d) 184, certiorari granted and caused reversed, 67 S. Ct. 64; 91 L. Ed. 30; ..... U. S. ....., states: "It appears to me that a judgment of conviction wholly unsupported by any competent testimony presents a direct challenge to the 'fairness, integrity, or public reputation of judicial proceedings.' " In this cause the verdict of the jury and the judgment entered thereon is wholly unsupported by any testimony. There was no evidence justifying the submission of this cause to the jury and consequently no proof upon which the judgment of conviction can rest. There is no evidence against this petitioner.

B.

The United States Circuit Court of Appeals for the Seventh Circuit in failing to reverse the action of the United States District Court for the Southern District of Indiana, has sanctioned in this cause departure from the accepted and usual course of judicial proceedings in the court below as to call for the exercise of the United States Supreme Court's power of supervision.

When the trial court gave the jury further instructions, the Court made certain statements to the jury after the jury appeared hopelessly deadlocked, which were prejudicial, erroneous and coercive.

There is meant no disrespect to Judge Wham for no one could esteem him more than appellant's counsel, but we feel those remarks were prejudicial and harmful to appellant, and coercive to the jury. This case was given over to

the jury on Tuesday evening, January 14, 1947 at 7:30 o'clock (Tr. 124). The jury deliberated until Wednesday morning, January 15, 1947 at 9:45 when the jury was called into Court, when the following colloquy occurred between the Judge and Foreman, the jury being present, as follows:

> "The Court: Who is the foreman of this jury? (Mr. Ford.)
>
> The Court: Have you been able to arrive at a verdict, Mr. Foreman?
>
> Mr. Ford (the Foreman): No, your Honor, the jury has been unable to arrive at a verdict.
>
> The Court: Is the jury being troubled by a question of fact or law?
>
> The Foreman: I think not. It has all been discussed for many hours.
>
> The Court: Are there any questions of the law or any question of the instructions of the Court that you cannot understand?
>
> The Foreman: I think there might have been a little doubt about the instructions, interpretations of conspiracy, possibly a definition of it.
>
> The Court: Well, I think I covered that so fully that I doubt if I could make it any more clear, if I would attempt to.
>
> I would assume from what you said it is largely a question of fact, isn't it?
>
> The Foreman: I don't quite know how to express it, but there is doubt in some of the minds on whether conspiracy was perpetrated."

The Court then proceeded to further instruct the jury, using the language which we are criticizing as prejudicial, harmful and coercive, as follows:

> "Now, I want you to go back to the jury room, and go through the evidence again, and if necessary a second time—go through it and keep working.
>
> I sometimes work for days, trying to reach a solution of a case. I don't quit working. The jury must work, and you just can't guess a case off. You have

got to work at it, review and review, try to get together. That is the purpose and the duty of the jury and if the juries will not get together, the courts are stalemated, they can't make any progress."

It is not a part of a juror's duty or the jury's duty to get together so the Court can progress. The sole and only duty of the jury and its members is to honestly and conscientiously deliberate and if they cannot get together, then the Court has a duty to perform which is to discharge the jury. The meaning of the word stalemate is "to bring to a standstill", and when the Court instructs the jury that unless they reach a verdict the court is brought to a standstill and the Court cannot make any progress, it is tantamount to placing a responsibility and duty on the jury that is not the law. We seriously urge that this admonition of the court was largely responsible in hurrying the jury to a finding of guilty.

This duty and responsibility of a juror or a jury is so fundamental that authorities on the subject are very few, however, we do find an Alabama case, definitely in point. In *Sherwill* v. *State,* (1903) 138 Ala. 3, 35 So. 129, 130, 132. At page 130 of said case quoting from 35 Southern Reporter, the Court gave this instruction No. 35 as follows: "You must reconcile the testimony, so as to make all the witnesses speak the truth, and if you can so reconcile it upon a reasonable hypothesis of the defendant's innocence, you must acquit him." At page 132, the Court in reversing the judgment on the verdict of the jury, says: "Charge 35 is bad. Its tendency is to require the jury absolutely to reconcile the testimony, which is in hopeless conflict."

So in the instant case the Court charged the jury, or its tendency was that it was the duty and responsibility of the jury to agree on a verdict, otherwise, the courts are stale-mated, they can't make any progress.

In regard to the further instructions by the Court to the jury, which are above set out, the petitioner asserts same was prejudicial, erroneons and coercive. However, the petitioner admits that he interposed no objections to the further instructions that the Court gave to the jury at the time the Court so instructed it, but the petitioner takes the position that said instructions were so prejudicial that a timely objection by counsel was unnecessary in order for the Court to give same consideration, and that said instructions are grounds for granting this writ. In this respect the petitioner calls the Court's attention to the following cases:

United States v. *Atkinson* (1936), 297 U. S. 157; 80 L. Ed. 555.

Sykes v. *United States* (1913), 204 Fed. 909.

Cox v. *United States* (1938), 96 Fed. (2d) 41 and cases cited therein.

C.

The petitioner contends that the Supreme Court of the United States has jurisdiction to reverse the judgment in question on certiorari for the reason that Hon. Walter C. Lindley, Judge of the United States District Court for the Eastern District of Illinois, improperly sat, heard, determined and concurred in the majority opinion with Hon. Otto Kerner as a member of the United States Circuit Court of Appeals for the Seventh Circuit, Hon. William M. Sparks, Chief Justice, dissenting in controversion of the provisions of Sec. 120 of the Judicial Code as amended, Title 28, Sec. 216, U. S. C. A., to-wit: " * * * Provided that no judge before whom a cause or question may have been tried or heard in a district court or existing circuit court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

"There is a distinction between certiorari and mandamus and the former may in some instances be the more appropriate remedy. Such would be the case when the question is whether the judgment or decree of the Circuit Court of Appeals is void, because one of the judges who took part in the decision was forbidden by law to sit at the hearing." *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.* (1893), 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758.

The said Hon. Walter C. Lindley had previously been properly authorized and duly designated and assigned to try the case of *United States of America* v. *Sterling J. Perry* in the United States District Court for the Southern District of Indiana, the same being cause No. 8575 on the docket of said Court, wherein the Hon. Robert C. Baltzell, Judge of the United State District Court for the Southern District of Indiana had voluntarily disqualified himself for the trial of said cause against the said Sterling J. Perry and the said Hon. Walter C. Lindley did, as Judge in the United States District Court for the Southern District of Indiana, accept the plea of guilty of said Sterling J. Perry in the said cause wherein he was charged with embezzlement, misapplication of funds and false entries in the records of The National City Bank of Evansville (Tr. 101) and the said Hon. Walter C. Lindley did impose sentence upon said Sterling J. Perry in said cause and entered judgment of five years on Counts 1, 2 and 3 of said indictment and $5,000.00 fine. Term to be served consecutively and cumulative. On Counts 4 to 11 inclusive sentence was deferred. Said term to be followed by three years on probation. A certified copy of said sentence is attached to petitioner's petition for writ of certiorari in this cause and by reference is incorporated in this brief and made a part of this argument.

The petitioner herein was charged in this cause by indictment in the United States District Court for the Southern District of Indiana with the offense of conspiring with the said Sterling J. Perry to do the very acts pleaded guilty to by the said Sterling J. Perry, viz.: embezzling, misapplying funds and making false entries in the records of The National City Bank of Evansville. Therefore, the said Hon. Walter C. Lindley at the time he sat on the bench of the United States Circuit Court of Appeals for the Seventh Circuit had served as the trial judge in said cause of action in the lower court, which action presented the same set of facts and the same related questions as were presented upon appeal of the within cause of action. The fact that the Hon. Walter C. Lindley sat as Judge in the case of *United States of America* v. *Sterling J. Perry* is shown by said certified copy of the judgment of the U. S. District Court for the Southern District of Indiana.

By reason of the foregoing facts it is disclosed by the record that this petitioner was indicted for conspiring with said Perry to do those acts set out in the indictment against Perry, and that Perry was the Government's chief witness in the trial of this cause in the lower court and that the record in this petitioner's case recites all the illegal acts done by said Sterling J. Perry, and said facts were heard by the Hon. Walter C. Lindley as Judge of the United States District Court for the Southern District of Indiana, at the time he passed sentence on said Perry.

In support of petitioner's position the following case is of interest, to-wit: *Moran* v. *Dillingham*, (1899) 174 U. S. 153, 19 S. Ct. R. 620, 43 L. Ed. 930. "A judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting on the Circuit Court of Appeals in the hearing and decision of any question in the same case, which involves in *any* degree matters upon which he has had occasion to pass in the lower court."

Hon. Walter C. Lindley by presiding over the hearing at the time said Sterling J. Perry pleaded guilty, had before him all the facts and questions that are involved in the case against the petitioner, and had an opportunity at said time to investigate the charges set out in the indictment against Sterling J. Perry before passing sentence. The *Moran* case, *supra,* states that if the Judge sat in the hearing and decision of *any* question in the same case he is disqualified. This petitioner asserts that the Hon. Walter C. Lindley sat in the hearing of all questions involved in this case by hearing the case against said Sterling J. Perry.

The case of *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtis Marine, Turbine Co., et al.,* (1913) 228 U. S. 645, 57 L. Ed. 1003, 33 S. Ct. 722, says that Sec. 120 of the Judicial Code "applies to a trial judge who did not in substance form or express an opinion in the case of the first instance but merely entered a *pro forma* decree for the purpose of enabling the case to be heard for the first time by the reviewing court, acting *pro bac vice* as a court of first instance."

It is the practice of the United States Circuit Court of Appeals for the Seventh Circuit to keep the names of the judges who are to hear cases before the court on oral argument from the parties to the action, and at the time oral argument in this case was heard, the names of the judges were not revealed to the petitioner or his attorneys, nor were they announced at the time of oral argument, and the petitioner and his attorneys did not know that one of the judges sitting on the bench of the United States Circuit Court of Appeals for the Seventh Circuit was the Hon. Walter C. Lindley who had set on the United States District Court for the Southern District of Indiana in the Sterling J. Perry case. Therefore said petitioner and his attorneys did not enter an objection to Hon. Walter C. Lindley hearing and determining said cause. "Certiorari will issue

from the Federal Supreme Court to a Circuit Court of Appeals where the judge who heard and disposed of the case in the first instance also sat in the Circuit Court of Appeals, contrary to the Judicial Code, Paragraph 120, for the purpose of reviewing his own action, although no objection was made to his participation in the hearing and decision of the case in the appellate court." *William Cramp & Sons Ship & Engine Building Co.* case, *supra.*

Petitioner further asserts that had Hon. Walter C. Lindley been called as a juror in this case in the lower court, he would have been disqualified to serve as a juror and, therefore, been dismissed for cause at the request of the petitioner for the reason that he had previously sat at the trial and sentencing of Sterling J. Perry. Therefore, petitioner contends that he was disqualified as a hearing judge of the United States Circuit Court of Appeals for the Seventh Circuit on the appeal of this case.

A majority of the judges of the United States Circuit Court of Appeals for the Seventh Circuit did not pass upon the merits of petitioner's appeal to that court. Judge Sparks and Judge Kerner, who were the Circuit Court Judges who heard the cause, failed to agree, Judge Sparks as Chief Justice dissenting, thereby enabling Judge Walter C. Lindley, District Judge, who was disqualified by the foregoing statute, to cast the deciding vote in sustaining the lower court. This resolves itself into the United States District Court for the Southern District of Indiana sustaining the judgment of the United States District Court for the Southern District of Indiana.

By reason of the disqualification of the Hon. Walter C. Lindley and the impropriety of his serving in this cause in the United States Circuit Court of Appeals for the Seventh Circuit by said statutory provision, the United States Supreme Court should grant certiorari herein and review the entire proceedings in this case.

The petitioner was guaranteed by the terms of the Fifth Amendment of the Constitution of the United States that he be not deprived of his liberty without due process of law. The record in this cause discloses a total lack of evidence to sustain the verdict of the jury convicting petitioner of the crime charged. Due process of law is best defined in the *Dartmouth College* case, 4 Wheat. 518, 4 L. Ed. 629, as follows:

> "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

In the case of *People* v. *Dickerson*, (1910) 164 Mich. 148; 129 N. W. 199, 200; 33 L. R. A. (N. S.) 917; Ann. Cas. 1912B, 688, it is said:

> "From an examination of the authorities, it is apparent that this constitutional guaranty simply preserves to the people rights which had existed for centuries, and which had been enjoyed according to the course of the common law. It means such an exercise of governmental power as is sanctioned by settled maxims of law, under such safeguards for the protection of individual rights as those maxims prescribed."

In the case of *People* v. *Licavoli*, (1933) 264 Mich. 643; 250 N. W. 520, the court said:

> "But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the

proposition that the state must prove a case against him. * * *

The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward. 'The fact that he is charged with a crime gives him certain special privileges. Among these are the requirements of the state to prove the charge against him beyond a reasonable doubt; the constitutional prohibition of compelling him to accuse or furnish evidence against himself; the right to meet the witnesses against him face to face, and so forth.' * * *

* * * * *

American law accords an accused the presumption of innocence, and due process of law requires that, before a conviction be had, this presumption must be removed by evidence establishing guilt beyond a reasonable doubt."

In *Frederick* v. *State,* (1924) Ct. of App. of Ala. 102 So. 146; certiorari denied, S. Ct. of Ala., 102 So. 147, the court said:

"* * * until the state makes out its case by meeting the burden resting upon it courts or juries have no right or authority to convict, for the fundamental law of the land is that in all criminal prosecutions the accused * * * shall not be deprived of life, liberty, or property, except by due process of law."

16 C. J. S. 1181, Sec. 589 contains the following:

"As applied to a criminal prosecution, due process of law requires not only that accused, after a plea of not guilty, shall not be put on his defense or deprived of his liberty until the state has produced evidence tending to prove that the crime charged has been committed and tending to connect accused with the commission thereof, but also that he shall not be convicted until the state has made out its case and removed the presumption of innocence by evidence establishing guilt beyond a reasonable doubt. *A conviction is not obtained by due process of law where it is based on suspicion, hearsay evidence,* * * *."

In *Smith* v. *State,* (1936) Court of Appeals, Okla., 58 Pac. (2) 347, it is said:

> "A conviction based upon hearsay evidence or suspicion is not obtained by due process of law and is contrary to * * * the United States Constitution."

In the case of *Tot* v. *United States,* (1943) 319 U. S. 463; 63 S. Ct. 1241; 87 L. Ed. 1519, Justice Roberts in discussing a federal statute making the possession of fire arms after conviction of a crime of violence presumptive evidence of their interstate transportation, made these pertinent statements:

> "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible."

Justice Black in a concurring opinion stated:

> "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers* v. *Florida,* 309 U. S. 227, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716, stand as a constitutional barrier against thus obtaining a conviction, ibid., 309 U. S. at pages 235-238, 60 S. Ct. at pages 476, 477, 84 L. Ed. 716. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel;

and *where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.*"

Judge Major in the dissenting opinion in *United States* v. *Bailey* (1946), 155 F. (2) 184, stated:

> "It appears to me that *a judgment of conviction wholly unsupported by any competent testimony presents a direct challenge to the 'fairness, integrity or public reputation of judicial proceedings.'* "

Certiorari granted on Government's confession of error and cause reversed. *Bailey* v. *U. S.* (1946), ... U. S. .....; 67 S. Ct. 64; 91 L. Ed. 30.

An examination of the evidence in this case will support the following statements: There is no competent evidence which sustains the verdict of the jury. The evidence points surely, clearly and unerringly to the innocence of the petitioner. In the most favorable light to the Government's position, the evidence shows merely that the petitioner and Sterling J. Perry were acquainted. This is not even sufficient to create a suspicion against said petitioner. There is no evidence of conspiracy; on the contrary, there is positive proof from the Government's own witness that there was no conspiracy. Certainly the proof in this cause fell short of the standard laid down as a part of the law of the land that before one is deprived of his liberty he must be proven guilty beyond all reasonable doubt. In this case, as in all criminal prosecutions, the burden was upon the Government and the Government failed to sustain that burden. The petitioner respectfully submits that there is a substantial constitutional question involved herein by

reason of the deprivation of petitioner's liberty without due process of law, and this cause must be reversed.

Conclusion.

The conviction of the petitioner affirmed by the United States Circuit Court of Appeals for the Seventh Circuit under the circumstances herein presented calls for the granting of the writ of certiorari as prayed. The Hon. Walter C. Lindley should not have served in this cause in the United States Circuit Court of Appeals. The fact that he did now constitutes a compelling reason for the United States Supreme Court to grant certiorari herein and to review each question presented upon the merits. The petitioner seeks an examination of the record herein, fully confident that he will be substantiated in his claim of innocence. There is no competent evidence in this record showing anything but petitioner's innocence. It necessarily follows that there is no evidence to sustain the erroneous verdict of the jury. A conviction not supported by any evidence presents in the words of Judge Major "a direct challenge to the 'fairness, integrity or public reputation of judicial proceedings.' " This cause presents such a challenge. If a conviction of this petitioner were allowed to stand merely because it is difficult to analyze the downfall of a man of Perry's stature without casting some suspicion on his associates, then suspicion takes the place of proof and the constitutional guarantee of due process means nothing. The government's evidence in this cause —the petitioner offered no evidence—established the innocence of the petitioner beyond all reasonable doubt. That he, an innocent man, stands convicted and sentenced to be deprived of his liberty presents a problem vital to the petitioner, but beyond that it presents a problem vital to the administration of criminal justice in the federal courts.

Bristol Hackbusch by his petition prays the Supreme Court of the United States grant a writ of certiorari herein to the end that his erroneous conviction may be set aside and this cause reversed. The allegations of his petition which cannot be controverted demand and require that the relief herein prayed be granted.

Respectfully submitted,

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January 20, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 555

BRISTOL HACKBUSCH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER IN REPLY TO BRIEF OF THE UNITED STATES.

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THE GOVERNMENT'S SUMMARY OF THE EVIDENCE AGAINST PETITIONER HACKBUSCH.

The Government in its brief summarized the evidence against the petitioner herein on pages 9 to 11. An analysis of this summary is in order.

"Perry met Hackbusch about the middle of 1942, and occasionally made small loans to him."

This is no proof of the conspiracy charged in the indictment.

"Hackbusch had an account in the bank in his name as trustee."

This was perfectly legitimate and does not serve to prove any charge of conspiracy contained in the indictment.

"Perry started cashing checks drawn by Hackbusch for which Hackbusch did not have sufficient funds on deposit, and used for that purpose money in the cash drawer of the bank."

Perry at first used his own funds to deposit money to Hackbusch's account so there would be sufficient funds to pay the checks drawn by Hackbusch. This was perfectly legitimate. Hackbusch was never advised that Perry was using money from the cash drawer of the bank, or otherwise, in order to deposit same to his account. It was incumbent upon the Government to show Hackbusch's knowledge of Perry's defalcation in order to sustain the charges of the indictment.

"Perry would hold the checks, and when Hackbusch's account had sufficient funds, Perry would charge as many checks as possible back into Hackbusch's legitimate account."

The evidence discloses that Hackbusch had no knowledge of any other account in said bank except his legitimate account. The evidence shows that Hackbusch had no knowledge of the various other accounts maintained by Perry. The methods pursued by Perry were unknown to Hackbusch, and Hackbusch had no reason to believe that Perry was defaulting at the bank. Perry testified that he carefully concealed this fact from Hackbusch. Perry also testified that he established these other accounts to enable him to keep track of how much money Hackbusch owed him.

"In September 1943, Perry opened the S. Hackran account in which he deposited money misapplied from the bank's funds."

The evidence conclusively shows that Hackbusch never had any knowledge or intimation of this account.

"Through that account, he cleared checks, bearing Hackbusch's signature, for which Hackbusch did not have sufficient funds in his regular account."

The evidence conclusively shows that Hackbusch did not have any knowledge that any of his checks were being cleared through any but his own legitimate account, and the evidence conclusively shows that Hackbusch did not have any knowledge other than that these funds were Perry's own personal funds.

"On January 22, 1944, Perry opened a special account in the name of Hackbusch, again using money misapplied from the funds of the bank."

There is no evidence that Hackbusch knew of this, nor is there any evidence upon which such an inference can be drawn.

"At the time he opened that account, he had 13 checks drawn by Hackbusch totalling $700."

This does not prove any allegation of the indictment touching upon conspiracy. Hackbusch had no knowledge of the existence of this account or its use, and there is no evidence from which such an inference can be drawn.

"Through that account, he cleared those and other checks drawn by Hackbusch."

The evidence shows that Hackbusch had no knowledge of this and there is no evidence which would support such an inference.

"According to the records of the bank, Hackbusch received, through Perry's cashing of his checks, $27,582.91 above the amounts deposited in his regular account."

The foregoing amount represents the amount of indebtedness from Hackbusch to Perry. There is not a single bit of evidence in this record that shows that Hackbusch had any knowledge that this sum represented any of the funds of the National City Bank, and there is no evidence which would support such an inference.

"Hackbusch received statements on his legitimate trustee account but received no statements of the accounts set up by Perry."

This is true, and supports the innocence of the petitioner.

"Perry would accumulate the checks he cleared and deliver them in batches to Hackbusch, totalling the amounts of those delivered on adding machine tape."

This statement is true but it fails to prove a single allegation of the indictment touching upon the subject of conspiracy. It is corroborative of the innocence of the accused, in his assertion that he was borrowing the money from Perry.

"Hackbusch never questioned Perry about the fact that the checks which he had drawn did not appear on his regular bank statements."

This statement does not support any inference of guilt on the part of the accused, but supports the asserted innocence of the petitioner that this transaction was, so far as Hackbusch was concerned, a personal loan from Perry.

"In a credit statement made by Hackbusch on May 23, 1944, he failed to list any indebtedness either to Perry or the bank."

He was not indebted to the bank. The mere fact that one does not list his entire indebtedness on a credit statement is not such a circumstance as to point unerringly to the guilt of the accused, and proves nothing other than the fact that he failed to disclose this indebtedness to Perry.

"Perry estimated that he had given Hackbusch between 40 and 50 thousand dollars of the bank's money."

This is Perry's testimony and shows conclusively that Hackbusch at least paid approximately $23,000 of the loan back to Perry, because the evidence shows that he only owed Perry $27,000. However, the evidence fails to disclose that Hackbusch knew this was the bank's money and there is no evidence to support such an inference.

"Hackbusch did not take the stand in his own behalf."

This was the constitutional right of the petitioner and did not relieve the Government of proving his guilt beyond all reasonable doubt, and such fact did not relieve the Government of meeting its burden of proving the guilt of the petitioner in such a manner as to exclude every other hypothesis but that of his guilt.

An analysis of the Government's summary of the evidence above referred to reveals that there is no evidence to support the conviction herein, and the Government in its said brief has failed to point out any evidence in the record which supports this conviction.

1.

The Conviction of Petitioner Is Not Supported by Any Evidence.

The majority written opinion in this cause is based upon the case of *Ray* v. *United States,* 114 Fed. 2d 508 (1940) (C.C.A. 8). The Government continues to rely upon this case. (See page 12 of Government's Brief.) Said case is not analogous to the facts presented by the record in the case at bar. An examination of the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Ray* v. *United States* will reveal that Judge Kerner and Judge Lindley, constituting the majority of the Circuit Court of Appeals for the Seventh Circuit in the instant case, have erroneously determined that this cause of action presents a parallel situation. This is not true and the affirmance of petitioner's conviction based upon the erroneous assumption that the Ray case is an authority herein demands a reversal of this cause upon the grant of certiorari. No criticism of the Ray case can be offered as applied to the facts therein involved, but the facts in this case are not analogous in any vital respect. The following statement from the opinion of the court in the Ray case will support the foregoing contention:

> "The defendant Schutte admitted her guilt in all respects and related in her testimony how for a period of many years appellant had overdrawn his account and how the deficit had increased with the years. She stated that she often throughout the period discussed the situation with him, that he promised to use the money from the sale of a mine, from his mother's estate and from other sources to repay the bank, but that he always failed to do so."

There is no evidence in the instant case that Perry ever discussed with Hackbusch any indebtedness to the National

City Bank on the part of Hackbusch or that the funds being placed at Hackbusch's disposal constituted funds of the National City Bank. The exact contrary is true. The uncontradicted evidence of the Government conclusively shows that it was Hackbusch's understanding that these funds were Perry's own personal funds. The uncontradicted evidence is that Hackbusch did not know of Perry's defalcation. In this case Hackbusch carefully concealed from Hackbusch any knowledge of his defalcation to the National City Bank, carefully concealed from Hackbusch the fact that he was securing these funds from sources other than his own money, and Perry testified that he made this concealment as a matter of pride. This evidence is uncontradicted and these facts make the instant case clearly distinguishable from the case of *Ray* v. *United States.* In the Ray case the court disposes of this issue by this statement:

> "In addition to the testimony of the defendant Schutte, the two accountants and the records of the bank, there was other corroborative evidence that made a prima facie case for the jury. The evidence offered by the government, if believed by the jury, was ample to prove guilt beyond a reasonable doubt."

A reading of the opinion in the Ray case does not reveal what this corroborative evidence was. However, in the instant case there is no evidence and, therefore, there was nothing to corroborate. The Ray case relied upon by the majority of the Circuit Court of Appeals in its written opinion herein is not authority for the affirmance of the judgment of the District Court in the case at bar.

Said case of *Ray* v. *United States* is further distinguishable for the reason that there was never an understanding between the defendant Schutte therein and the defendant Ray that the funds constituted a personal loan on the part of Schutte to Ray, whereas here the evidence shows that there was no understanding between Perry and Hackbusch

other than that the funds advanced to Hackbusch by Perry constituted a personal loan of Perry's own money. In the Ray case, Ray knew the money he was receiving from the defendant Schutte was not Schutte's money but money which belonged to a bank. The Ray case is distinguishable upon other grounds. The evidence there showed that Schutte and the appellant's wife were girlhood friends, a bridesmaid at appellant's wedding and godmother for their first baby. They lived next door to each other and were intimate friends for years. No such facts are shown in the instant case. In the Ray case the appellant was bound to have known the financial condition of Schutte, an employee of the bank and, in fact, did know that the funds there placed at his disposal were bank funds, as shown above. Here the defendant Hackbusch was not intimately acquainted with Perry, and their relationship was limited solely to business transactions. The evidence is silent as to any knowledge on the part of Hackbusch as to Perry's financial worth. Perry, a witness for the Government, did not testify that he had ever revealed to Hackbusch his financial worth; in fact, that was never discussed between Perry and Hackbusch. The petitioner herein feels that the absence of such a showing upon the part of the Government in the trial of this cause in the District Court constitutes a fatal weakness in the chain of circumstances which it was necessary that they develop in this cause to sustain a conviction. The evidence when carefully analyzed fails to reveal any proof to indicate that Hackbusch at any time had any reason to believe that the funds being placed at his disposal were funds of any other person than Perry. There is no evidence in this record that would permit the inference that Hackbusch knew that these funds were coming wrongfully from the National City Bank. The majority of the Circuit Court of Appeals in their written opinion herein, in discussing the Ray case stated

that she, Mary V. Schutte, testified that she pursued this course of conduct because of her friendship for Ray and his family, and that Ray was innocent. It is not suggested by the petitioner that Perry testified that the petitioner was innocent. The contention herein made by the petitioner is that Perry testified that Hackbusch had no part in or knowledge of his, Perry's defalcations, whereas in the Ray case the evidence showed conclusively that the appellant Ray knew the bank employee was misappropriating bank funds.

The Government's brief in opposition to petitioner's application for writ of certiorari herein refers to petitioner's attack on the standard of appellate review applied by the Circuit Court of Appeals. This petition presents a situation wherein the accused stands convicted without any evidence to support the verdict of the jury. In such an instance there is but one standard which should have been applied in the Circuit Court of Appeals, and that was to set aside the conviction. That is the standard to be applied here upon the presentation of this petition for writ of certiorari. This cause does not present an instance wherein the appellate court is asked to weigh the evidence. Relief is herein sought from a judgment of conviction wholly unsupported by any evidence. The law covering the rights of the accused is as applicable in an appellate court as in a trial court. In support of our contention we call the court's attention to the case of *Karn* v. *United States,* 158 Fed. 2d 568 (C.C.A. 9), which was an appeal from a conviction for larceny. In that case the Government relied entirely upon circumstantial evidence for a conviction, as did the Government in the instant case. We submit the following quotation from the opinion of the court in *Karn* v. *United States, supra:*

> "Viewing the evidence most favorable to the Government, we gather from the record the following facts:

The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, 907, pp. 151, 152; *Paddock* v. *United States,* 9 Cir., 1935, 79 F. 2d 872, 876; *Ferris* v. *United States,* 9 Cir., 1930, 40 F. 2d 837, 840. Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard.

"Nothing in the testimony indicates that appellant was aware of this fact. Hammond testified that of the missing $1079, one-half was in silver coin. This being the case, the jury had before it the fact that when taken into custody appellant had on his person a sum of paper money amounting to something over one-half of the total amount of paper money claimed to be missing. It is true that the money found on him could have been part of the stolen currency. But so far as the record shows, it is equally true that it could have been part of the money he had borrowed from Gilbertson. Whatever doubt or uncertainty resides in this situation was not eliminated by the testimony of witnesses for the prosecution.

"The only attempt made by the prosecution to directly link the money found in appellant's possession at the time of his arrest with the money stolen from the Chena Bar, was by the testimony of witness Hill. His attempted identification of the soiled ten dollar bill found in the possession of appellant as one that was in the cash register of the Chena Bar on the night of the theft was so vague and unsatisfactory as to create a reasonable doubt that the said bill was a part of this Chena Bar money. The bill was soiled, but so much may be said of a lot of paper money.

"It is true that actual possession of stolen property may be shown, but it is equally true that the prosecu-

tion must also prove, beyond a reasonable doubt, that the property found in possession of the accused is, in truth and in fact, the identical property which was stolen. A bare assertion that property in the hands of accused is 'similar property' or property that 'looks like it,' is not sufficient to establish such property as the stolen property.

"The burden is not on a defendant in a criminal case to prove his innocence since the burden rests upon the prosecution to establish every element of the crime with which he is charged, to a moral certainty and beyond reasonable doubt."

The standard which the petitioner sought to have the Circuit Court of Appeals apply and the standard which petitioner now seeks the Supreme Court of the United States to apply is that a conviction must be supported by competent evidence, not based solely on suspicion, guess or conjecture. A conviction not so supported by the evidence is not obtained by due process of law.

2.

Judge Walter C. Lindley Was Disqualified to Act as Judge of the Circuit Court of Appeals.

The Government answers Petitioner's attack on the disqualification of Judge Walter C. Lindley to hear this cause on appeal to the Circuit Court of Appeals for the Seventh Circuit with the mere statement:

"There is no merit in this contention. Judge Lindley did not act in the district court on any question concerning petitioners' guilt. Perry's defalcations were not disputed in either case and were not in issue on petitioners' appeals."

Government's Brief, page 14.

This is not a sufficient answer to the contention made by

the Petitioner. The disqualification of Judge Lindley is not to be determined by Perry's admitted guilt. What controls this situation is the fact that Judge Lindley was confronted as Judge of the United States District Court in the Perry case with *"questions"* that were also involved in this the Hackbusch case on appeal to the Circuit Court of Appeals. Reference to the indictment against Perry set out as Exhibit I to the petition for writ of certiorari herein, pages 27-44 thereof, convincingly supports Petitioner's assertions of the disqualification of Judge Lindley. Reduced to a simple proposition, underlying our whole judicial structure is the guarantee to every accused of a fair trial before an impartial and unbiased judiciary. Such consideration motivated the passage of the statute to which reference has been made herein and which is controlling, Section 120 of the Judicial Code as Amended, Title 28, Section 216, U.S.C.A. The right of appeal to the Circuit Court of Appeals necessarily carries with it the implication that the cause will be given a fresh, new consideration, unencumbered and unhampered by previously fixed opinions and convictions of the judges.

> "* * * A federal statute provides that no judge before whom a cause or question may have been tried or heard in a Federal District or existing Circuit Court shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."
>
> 30 Am. Jur. page 790, Sec. 83.

The above quotation from the text of the foregoing work is supported by this comment in the note thereunder:

> "The purpose and intention of Congress in enacting this provision manifestly was to require the Circuit Court of Appeals to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of the first instance."

The above work makes the following additional comment:

"The provision of the Federal statute above referred to disqualifies a judge who has once heard a cause upon its merits in the court of first instance from sitting in the court of appeals on the hearing and decision of any question, in the same cause, *which involves in any degree matter upon which he had occasion to pass in the lower court.* The disqualification arises not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the upper court to consider and pass on. That the question may be easy of solution, or that the parties consent to the judge's participation in its decision, can make no difference. The disqualification applies also to a trial judge who did not, in substance, form or express an opinion on the case in the first instance, but merely entered a pro forma decree to enable the case to be heard for the first time by the reviewing court. A district judge who heard and denied a motion to remand the cause to the state court whence it had been removed is disqualified to sit in the Circuit Court of Appeals upon the hearing of an appeal from the final decree of the Circuit Court in such case."

Under no consideration of this case was it proper for Judge Lindley to hear and determine this cause as a Judge of the Circuit Court of Appeals. The fact that he did sit and cast the determining vote for an affirmance herein, when the two regular judges of the Circuit Court of Appeals divided, Judge Kerner for affirmance and Sparks, Chief Judge, dissenting for reversal, now constitutes the compelling reason for the grant of certiorari herein as prayed.

3.

The Trial Court Coerced the Jury.

Here we have an instance where the trial court tells a body of laymen, which was the jury, that their failure to agree would amount to stalemating the court so that they can't make any progress. This is as near coercion of a jury to reach a verdict as could possibly be expressed. It amounted to telling the jury that they must agree, and the only stronger way it could be expressed was to tell the jury to go back in the jury room and agree. This constituted a coercion of the jury that requires a reversal of this cause. The position here in no manner is analogous to "It is well established that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict." The court in the instant case told the jury in effect that they must agree, and the jury had a right to conclude that if they did not agree under the instructions and statement that they were stalemating the progress of the court, and that it was their duty to go back to the jury room and agree.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 509

HARRY R. RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 555

BRISTOL HACKBUSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the majority in the circuit court of appeals (No. 509, R. 347–355; No. 555, R. 171–179), one judge dissenting without opinion, has not yet been reported.

JURISDICTION

In No. 509, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 346, 355), and a petition for rehearing was denied December 3, 1947 (R. 361). The petition for a writ of certiorari was filed January 2, 1948.

In No. 555, the judgment of the circuit court of appeals was entered November 3, 1947 (R. 179–180), and a petition for rehearing was denied on December 3, 1947 (R. 215). On December 29, the Chief Justice extended petitioner's time to file a petition for a writ of certiorari to February 1, 1948 (R. 216). The petition was filed on January 29, 1948.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

As to each petitioner:

1. Whether the evidence is sufficient to support the verdict.

2. Whether District Judge Lindley was disqualified from sitting as a member of the circuit court of appeals because he had previously sentenced the person named as a co-conspirator on his plea of guilty to an indictment charging substantive offenses.

Petitioner Hackbusch also raises the following question:

3. Whether the trial court coerced the jury when it sent them back for further deliberations.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

R. S. 5209, as amended (12 U. S. C. 592), provides in pertinent part:

> Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, or of any national banking association, or of any insured bank as defined in subsection (*c*) of section 12B of the Federal Reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or such national banking association or insured bank * * * or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, or such national banking association, or insured bank, with

intent in any case to injure or defraud such Federal reserve bank or member bank, or such national banking association or insured bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or such national banking association or insured bank, or the Board of Governors of the Federal Reserve System; * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

Section 120 of the Judicial Code (28 U. S. C. 216) provides in pertinent part:

> * * * In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or exist-

ing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

STATEMENT

Petitioners were separately indicted and separately tried for conspiring with one Sterling J. Perry to violate the Banking Act by having Perry, an officer of the National City Bank of Evansville, Indiana, a national and federally insured bank, misapply funds of the bank, and cause false entries to be made in the books and reports of the bank with intent to defraud the bank and deceive its officers, the Comptroller of the Currency, and bank examiners (No. 509, R. 2–12; No. 555, R. 2–12). Each was convicted (No. 509, R. 325; No. 555, R. 147), and each was sentenced to imprisonment for two years and to pay a fine of $5,000 (No. 509, R. 333–334; No. 555, R. 154). On appeal, the judgments against petitioners were affirmed (No. 509, R. 355; No. 555, R. 179–180).

Although the cases were separately tried, the schemes proved and the contentions of petitioners were so similar that the circuit court of appeals treated the appeals in both cases in one opinion, and for the same reasons, we treat the cases together in this brief. Each case involves the relationship of the petitioner with Sterling J. Perry, an officer of the National City Bank of Evansville, who, at the times in question here, held the position of cashier and vice-president.

In each case, it was established without dispute that in May 1946, Perry admitted that he had embezzled and misapplied $142,000 of the bank's funds. (No. 509, R. 33, 37–38, 41, 124–125; No. 555, R. 26–28, 85, 101.) It is not disputed that petitioners received substantial sums from Perry, as set forth below. The question at issue in each case was whether the petitioner knew that the money so received was the bank's money obtained by Perry through misapplication of the bank's funds.

The Government's evidence against Randall (No. 509) may be summarized as follows:

Perry met Randall in 1939, and in the years 1940 and 1941, loaned him, from personal funds, small sums of money which were repaid (R. 124, 125, 127). In 1943, Randall's demands on Perry became heavier (R. 127), and Perry began to cash Randall's personal checks with funds of the bank, taking money from the bank's cash drawer and making false entries in the bank records (R. 132–133). He would keep the checks in a drawer and eventually deliver a group of them to Randall (R. 132–133). Randall had a personal account in the bank only for the period from June 16, 1939, to July 2, 1941 (Gov. Ex. B–1, R. 60, 164).

In September 1943, Perry decided that this method of handling the transactions was too loose, and he opened an account in the name of S. Hackran (representing a combination of the names of Hackbusch and Randall) (R. 132, 134–

135; Gov. Ex. B–5, R. 61). However, only one check for a thousand dollars drawn by Randall was paid out of that account (R. 119–120, 167, 180). Perry apparently continued to cash Randall's personal checks by using money from the cash drawer (R. 168–169).

In February 1944, Perry opened an account in the name of Randall, which was known as the "Randall Red Special Account" to distinguish it from another special account carried by Randall (R. 131, 137–138; Gov. Ex. B–5, R. 61). Perry deposited in this account money misapplied from other funds of the bank (R. 144–145). Perry would debit the account with money which he paid for Randall's rent and living expenses, and would also clear through that account personal checks drawn by Randall (R. 137–141). Randall had a number of accounts in the bank at the time, but on none was payment authorized on his personal signature without special designation (R. 137–138, 145–146, 165–167; see R. 60–62). Perry would collect the checks and debit memoranda and deliver them in batches to Randall, totalling the amount on an adding machine tape (R. 133, 150, 161). Randall never received a bank statement accounting for his personal checks, although he did receive regular statements on his other accounts (R. 151, 161, 252, 284).

During the period from February 1944, when the special account was opened, until May 1946,

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when Perry confessed, a total of $16,335.98 was given to Randall (R. 180–181). Perry estimated that in all he had given Randall about $50,000 (R. 134).

Perry testified that he did not tell Randall of the accounts he had opened and did not tell him in so many words that he was using the bank's money to cover Randall's checks (R. 149, 150, 152, 161). He did say that he and Randall had discussed the situation, and that Randall knew the matter was urgent (R. 135).

Randall took the stand in his own behalf and testified that he thought Perry was lending him money on his own account (R. 245, 247). He admitted that when he issued checks with his personal signature, he did not expect the checks to be charged to any of his regular accounts in the bank (R. 273–274). He stated, "that was the account that I was borrowing money from Mr. Perry personally, and he was taking care of for me" (R. 273). He testified that he kept no check stubs for the checks issued on his personal signature, and relied on Perry's figures (R. 281–282).

At the end of December 1943, Randall had his accountant total the checks delivered to him by Perry, which amounted to about $8,900 and had the amount of $10,000 posted on his books as a debt to Perry (R. 210–211, 254). Randall testified that at that time he gave Perry a note for $10,000, and subsequently signed notes for the amounts received in later years (R. 253, 277,

279–280). Perry testified that he never received a note from Randall (R. 308–309).

In submitting the case to the jury, the judge instructed them that if they found that Randall in good faith believed that the money he received was loaned to him out of Perry's personal funds, and that Randall had no knowledge that Perry was cashing the checks with the bank's money, Randall could not be found guilty (R. 322). He also charged that if Randall had an understanding with Perry which would require Perry to misapply funds of the bank, Randall could be found guilty of conspiracy even though the jury did not find that he knew of the particular manner in which Perry handled the funds (R. 322–323).

The Government's evidence against Hackbusch (No. 555) may be summarized as follows:

Perry met Hackbusch about the middle of 1942, and occasionally made small loans to him (R. 86, 97). Hackbusch had an account in the bank in his name as trustee (R. 87; Gov. Ex. C–1, R. 49). Perry started cashing checks drawn by Hackbusch for which Hackbusch did not have sufficient funds on deposit, and used for that purpose money in the cash drawer of the bank. Perry would hold the checks, and when Hackbusch's account had sufficient funds, Perry would charge as many checks as possible back into Hackbusch's legitimate account (R. 91). In September 1943, Perry opened the S. Hackran account in which he

deposited money misapplied from the bank's funds (R. 89, 91). Through that account, he cleared checks, bearing Hackbusch's signature, for which Hackbusch did not have sufficient funds in his regular account (R. 92).

On January 22, 1944, Perry opened a special account in the name of Hackbusch, again using money misapplied from the funds of the bank (R. 93). At the time he opened that account, he had 13 checks drawn by Hackbusch totalling $700 (R. 93). Through that account, he cleared those and other checks drawn by Hackbusch (R. 93). According to the records of the bank, Hackbusch received, through Perry's cashing of his checks, $27,582.91 above the amounts deposited in his regular account (R. 121).

Hackbusch received statements on his legitimate trustee account but received no statements of the accounts set up by Perry (R. 97). Perry would accumulate the checks he cleared and deliver them in batches to Hackbusch, totalling the amounts of those delivered on adding machine tape (R. 98). Hackbusch never questioned Perry about the fact that the checks which he had drawn did not appear on his regular bank statements (R. 109).

In a credit statement made by Hackbusch on May 23, 1944, he failed to list any indebtedness either to Perry or the bank (Gov. Ex. 0–4, R. 81).

Perry estimated that he had given Hackbusch

between 40 and 50 thousand dollars of the bank's money (R. 96).

Hackbusch did not take the stand in his own behalf. His motion for a judgment of acquittal was denied by the trial judge (R. 148–151).

The judge's instructions to the jury as to the element of Hackbusch's knowledge of Perry's activities were similar to those given in the Randall case (R. 137–138; see, *supra*, p. 9).

ARGUMENT

1. Each of the petitioners contends that there was no proof that he knew that the money received from Perry came from misapplication of the bank's funds, and hence that the evidence was insufficient to support the verdict. In this connection, each of them argues that the circuit court of appeals applied an erroneous standard of appellate review in stating that its function was to determine whether the verdicts were supported by any substantial evidence. (No. 509, Pet. 3–9; No. 555, Pet. 17, 21, 54–63, 71–75.)

As we have shown, the question whether each petitioner knew that the money he was receiving from Perry had been obtained by misapplication of the bank's funds was submitted to the jury under instructions explicitly covering that issue. Each jury resolved that issue against each petitioner on, we submit, ample evidence.

It is undisputed that Randall and Hackbusch received at least $16,000 and $27,000, respectively,

over a period of years, by drawing checks on the National City Bank of Evansville, although they knew they did not have sufficient funds to cover those checks. They knew that their checks were not being cleared in regular fashion, since they never received regular statements for those checks. It is undisputed that they knew that Perry was covering the checks and that they expected him to do so. The jury had a right to conclude that petitioners knew that checks totalling large sums, which were continuously being cleared through the bank through the cooperation of Perry, the cashier of the bank, were cleared with the bank's money. The jury had a right to infer that businessmen know that they do not obtain personal loans from the cashier of a bank by drawing checks on the bank itself.

It was, of course, unimportant that Perry may not in so many words have told petitioners that he was using the bank's funds. Petitioners' practice of drawing checks on the bank for whatever expenses they had, regardless of whether or not they had funds in the bank, justified the inference that they had an understanding with Perry that he would see to it that their checks managed to clear the bank, and would use the bank's funds for that purpose. The evidence was therefore sufficient to support the conclusion that they conspired with Perry in misapplying the bank's funds. See *Ray* v. *United States,* 114 F. 2d 508 (C. C. A. 8), certiorari denied, 311 U. S. 709.

The judge properly instructed the jury that it was immaterial whether petitioners did or did not know the exact method by which Perry arranged to clear the checks. As this Court said in *Russell* v. *Post,* 138 U. S. 425, 431, a guilty person cannot "avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him."

Petitioners' attack on the standard of appellate review applied by the court below is without merit. The standard set forth in the opinion below is the standard laid down in numerous decisions of this Court. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 254; *Glasser* v. *United States,* 315 U. S. 60, 80; *Gorin* v. *United States,* 312 U. S. 19, 32; *Pierce* v. *United States,* 252 U. S. 239, 251–252; *Stilson* v. *United States,* 250 U. S. 583, 588–589; *Abrams* v. *United States,* 250 U. S. 616, 619. The principle that an acquittal must be had if the circumstances are as consistent with innocence as with guilt is essentially a rule for the jury and not for the court. *Curley* v. *United States,* 160 F. 2d 229 (App. D. C.), certiorari denied, 331 U. S. 837. In any event, by any standard of the sufficiency of the evidence, the evidence here is sufficient.

2. Petitioners also contend that, under Section 120 of the Judicial Code, District Judge Lindley was not qualified to sit as a member of the circuit court of appeals because he had sentenced Perry on Perry's plea of guilty to an indictment charg-

ing substantive violations of the Banking Act (No. 555, Pet. 21–22, 24, 66–70; No. 509, Supplemental Petition). There is no merit in this contention. Judge Lindley did not act in the district court on any question concerning petitioners' guilt. Perry's defalcations were not disputed in either case and were not in issue on petitioners' appeals.

3. In the Hackbusch case, No. 555, the judge gave his instructions to the jury at 7:30 p. m. on January 14, 1947 (R. 124.) At 9:45 the next morning,[1] the foreman stated that the jury had been unable to arrive at a verdict (R. 139). The following discussion ensued (R. 139–141):

> The COURT. Is the jury being troubled by a question of fact or law?
>
> The FOREMAN. I think not. It has all been discussed for many hours.
>
> The COURT. Are there any questions of the law or any question of the instructions of the Court that you can not understand?
>
> The FOREMAN. I think there might have been a little doubt about the instructions, interpretation of conspiracy, possible a definition of it.
>
> The COURT. Well, I think I covered that so fully that I doubt if I could make it any more clear, if I would attempt to.
>
> I would assume from what you said it is largely a question of fact, isn't it?

[1] The United States Attorney stated in his brief in the court below that the jury did not deliberate all night but retired to their hotel rooms about midnight.

The FOREMAN. I don't quite know how to express it, but there is doubt in some of the minds on whether conspiracy was perpetrated.

The COURT. Well, it is a question of fact that the jury has to determine. That is exactly the question.

Now, I want to say this to you men: You took this case last night, when you were tired and when I was tired, and you went to work after dinner, when you were still tired, I know, and worked faithfully no doubt during the evening, trying to arrive at some conclusion.

This case must be determined some time by somebody, and it is the duty of the jury to determine the case, if it is possible at all. If there were three judges, the three judges would have to get together on a judgment. Twelve jurors have always determined criminal cases and civil cases by getting together on a consensus of opinion that all could endorse.

No man, of course, should give up any conscientious conviction on a question of fact, but it is the duty of each juror to discuss earnestly with the other jurors every question that is involved, and to strive to get together in agreement upon some solution that all of you can endorse. That is the way jury verdicts are arrived at, and it is very important that no man should make up his mind to just simply sit back and say, "This is the way I feel about it—take it or leave it."

You must discuss with one another. You must review the evidence over and over again, if necessary, go through it, consider it, and reach a unanimous conclusion, if possible.

I say, I don't ask you and don't suggest even, that you give up a conscientious scruple or conviction, but I do ask you to strive earnestly to reach a verdict, one that you can all say, "This is my verdict."

Now, I want you to go back to the jury room, and go through the evidence again, and if necessary a second time—go through it and keep working.

I sometimes work for days, trying to reach a solution of a case. I don't quit working. The jury must work, and you just can't guess a case off. You have got to work at it, review and review, try to get together. That is the purpose and the duty of the jury and if the juries will not get together, the courts are stale-mated, they can't make any progress.

Any suggestions by any of the counsel.

(No suggestions were offered by counsel.)

The COURT. Then you may return to the jury room. If you reach a point where you feel you must have some clarification of the law, I would suggest that you put it down in writing; then ask the bailiff to bring you back into the court, and I will try to clarify any point that may be bothering you, as a matter of law. I can't help you on the facts. That is something you have to take care of yourselves.

At about 11:00 a. m., the jury asked for further instructions on conspiracy and the judge repeated his instructions (R. 141–146). At 1:45 p. m., the jury returned its verdict of guilty.

There is no merit in petitioner's contention that the judge's remarks constituted coercion of the jury (Pet. 20–21, 24, 63–67). It is well established that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 828; *United States* v. *Novick,* 124 F. 2d 107, 110 (C. C. A. 2), certiorari denied, 315 U. S. 813.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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